91-965

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CHRIST COLLEGE, INC., *et al.*,
Petitioners,

v.

BOARD OF SUPERVISORS, FAIRFAX COUNTY, VIRGINIA, *et al.*,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Must the strict scrutiny balancing test of *Wisconsin v. Yoder*, 406 U.S. 205, 215, 233 (1972), as recognized for free exercise "hybrid rights" in *Employment Division v. Smith*, 110 S. Ct. 1595, 1601 (1990), be used to determine the validity of government actions that limit the ability of religiously-motivated parents to direct the religious upbringing of their children, limit the ability of children to receive a religious education, and limit the ability of teachers to fulfill their religious mission of communicating religious instruction?

2. May there be a cause of action for violation of free exercise "hybrid rights" based upon allegations that discretionary governmental actions taken under color of facially neutral laws, "as applied" to religiously-motivated conduct, prevented and otherwise severely burdened that conduct?

3. Is it impossible as a matter of law for government actions that close down and limit a religious school to cause a burden upon the exercise of religion by the people who, because of religious motivations, operate, attend and send their children to that school?

4. Is it a violation of the Establishment Clause for a government agency to prohibit a religious school from continuing to use a church sanctuary for Bible classes and other religiously-oriented instruction, when the agency has not articulated any reason for the prohibition?

PARTIES TO THE PROCEEDING

Petitioners

Rev. Robert L. Thoburn (Parent; Teacher; School Owner and Founder)

Rosemary S. Thoburn (Parent; Teacher; School Co-Founder)

Lloyd L. Thoburn (Parent; School Administrator)

John M. Thoburn (Parent; School Project Manager)

Judy K. Dryden (Parent; Part-Time Teacher)

Glenn T. Dryden (Parent)

Dorothy L. Thoburn (Student)

Christ College, Inc. (Prospective Lessor)*

Respondents

Board of Supervisors, Fairfax County, Virginia**

Richard A. King, Acting Fairfax County Executive (in his official capacity)***

Town of Vienna, Virginia

Vienna Board of Zoning Appeals

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* There is no parent or subsidiary to this corporation.

** The following members of the Board of Supervisors were sued in their official capacities: Joseph Alexander, Sharon Bulova, Thomas M. Davis, III, Katherine D. Hanley, Gerald Hyland, Elaine McConnell, Audrey C. Moore, Martha V. Pennino, and Lilla Richards.

*** Mr. King is substituted pursuant to Supreme Court Rule 35.3 for J. Hamilton Lambert, who has resigned as Fairfax County Executive and who was sued in his official capacity.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review a judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

OPINIONS DELIVERED IN THE CASE BY OTHER COURTS

The unpublished opinion by the United States Court of Appeals for the Fourth Circuit is reprinted in the Appendix ("App.") at 1a-19a [1] and cited in a table of opinions at 944 F.2d 901 (4th Cir. 1991). The transcript of the unpublished oral opinion by the United States District Court for the Eastern District of Virginia, Alexandria Division, is reprinted App. at 26a-29a.[2]

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[1] The court of appeals' amendments to that opinion are reprinted App. at 20a-23a.

[2] The district court's order is reprinted App. at 30a.

JURISDICTION

The Fourth Circuit entered its judgment in this action on September 13, 1991. No rehearing was requested. This Petition is filed within 90 days of that judgment, pursuant to 28 U.S.C. § 2101(c) and U.S. Supreme Court Rule 13.1. The jurisdiction of this Court to review the judgment of the Fourth Circuit by writ of certiorari is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant parts of the following authorities are set forth verbatim in the Appendix:

U.S. Const. Amend. I

U.S. Const. Amend. XIV, § 1

42 U.S.C. § 1983

Va. Code Ann. § 15.1-490 (1989)

Va. Code Ann. §§ 22.1-254-66 (1985 and Supp. 1991)

Va. Code Ann. § 27-101 (Supp. 1991)

Va. Code Ann. § 58.1-3603 (1991)

Vienna, Va., Town Code § 7-14 (1988)

Vienna, Va., Town Code § 7-19 (1988)

Fairfax County, Va., Zoning Ordinance, Article 3 (Reprint 1988) (excerpts)

Fairfax County, Va., Zoning Ordinance, Article 9 (Reprint 1988; Supp. No. 24, 5/22/89) (excerpts)

May 19, 1989, Letter from Theodore Austell, III, Clerk to the Board of Supervisors, to Robert L. Thoburn

STATEMENT OF THE CASE

This is primarily a free exercise case that both the petitioners and respondents unsuccessfully argued should be decided under the principles enunciated in *Employment Division v. Smith*, 110 S. Ct. 1595 (1990). The courts below declined to apply *Smith*, amid expressions of confusion and uncertainty as to its holdings.

The petitioners complain that their efforts to relocate Fairfax Christian School to a centralized location in Fairfax County, Virginia, were transformed by a series of unprecedented and unconstitutional local government actions into a forced migration. Or, as the unrefuted testimony of one witness concisely put it: "The County was chasing Fairfax Christian School like a pack of dogs after a deer." Joint Appendix in the United States Court of Appeals for the Fourth Circuit ("J.A.") 1821. Respondents argue that the actions were an appropriate exercise of police powers.

The case was filed on August 1, 1989, in the United States District Court for the Eastern District of Virginia, Alexandria Division, to redress violations of rights secured by the First and Fourteenth Amendments to the Constitution of the United States. Deprivations of those rights were alleged under 42 U.S.C. § 1983, and the district court had jurisdiction pursuant to 28 U.S.C. § 1331.

Petitioners

All of the individual petitioners are evangelical Christians. Five of them are parents of children who attended Fairfax Christian School during the period of alleged violations: Rev. and Mrs. Robert L. Thoburn, Mr. and Mrs. Glenn T. Dryden, John M. Thoburn and Lloyd L. Thoburn. All of these parents, except for Mr. Dryden, taught or otherwise were employed at the school at relevant times. Dorothy L. Thoburn was eight years old when she testified at trial in 1990; she is, and was at all relevant times, a student at the school. Christ College, Inc., is a non-profit evangelical Christian college that was denied permission by respondent Fairfax County to conduct evening and Saturday classes at a site sought for Fairfax Christian School.

Fairfax Christian School and Its Relationship to Petitioners

Fairfax Christian School is a widely-recognized evangelical Christian teaching mission. J.A. 1585, 1732, 1734, 1768, 1939, 2031-32. The school was founded in 1961

by Rev. Thoburn, an ordained Presbyterian minister and religious educator who has helped start approximately 200 Christian schools in the United States. J.A. 1441, 1515-16, 1518. He is the owner and sole proprietor of Fairfax Christian School. J.A. 1581. Rev. Thoburn's wife, Rosemary, who is a teacher at the school, co-founded it. Fairfax Christian School is a co-ed college-preparatory institution for grades kindergarten through 12. J.A. 1521. All of the students who have graduated from the school have gone on to college. J.A. 1743. It is stipulated to be "a fine school." *Id.* Attendance there fully satisfies the Virginia compulsory education law. Va. Code Ann. §§ 22.1—254-66 (1985 and Supp. 1991).

As the trial court found, "There isn't any question that their evidence shows that the Thoburns and the people involved in this school are dedicated Christian people, and they are dedicated to providing a school for Christian education and have done so." App. at 27a. The petitioners believe that the Bible should be a required course in elementary and secondary education and that all academic subjects must be taught to children from an evangelical Christian, Bible-based perspective. J.A. 1516-17, 1741, 1810, 1814, 1939, 2015-16, 2031. This religious belief is exercised through activities at Fairfax Christian School. *Id.* The school expects its students to pray collectively before class and in special devotions periods, to study the Bible as the word of God and to treat all other subjects from an evangelical Christian perspective. J.A. 1516-18, 1521-22. Thus, for example, evolution is characterized in Fairfax Christian School science classes as a false theory that is contrary to the creationism that the Bible teaches.

Parents are required by law in Virginia to ensure that their children are educated by qualified schools or tutors. Va. Code Ann. §§ 22.1-254-66 (1985 and Supp. 1991). Fairfax Christian School is the only school in the county that meets the inextricably intertwined legal, religious and parental needs of the individual petitioners.

J.A. 1521, 1742-43, 1810-11, 2016-17. For evangelical Christians such as the parent petitioners, sending their children to public schools would be antithetical to their faith, destructive to their family relations and confusing to their children. J.A. 1517-18, 1741, 1811-12, 1814, 2016-17. In public school, their children could not be taught the central importance of God and prayer. Indeed, in public school, petitioners' children would be taught by authority figures things that their parents consider wrong and harmful to basic family values, such as evolution and prevailing attitudes toward student sexual activity. *See, e.g.*, J.A. 2016-17.

The Governmental Actions Affecting Petitioners

In 1984, Fairfax Christian School was a thriving institution for more than 500 students, with a wooded campus on Pope's Head Road in one of the more rural parts of Fairfax County. J.A. 1517, 1519-21. The missionaries who run the school decided at that time to accept a generous offer to buy their campus so that they could use the money to improve their facilities and relocate the school in a more centralized residential location. J.A. 1523-24. They decided to purchase approximately 40 wooded acres in a residential section of Oakton, Virginia, on which to build their new mission. J.A. 1526-29. Before purchasing the Oakton site, however, Rev. Thoburn had sought and received assurance by county officials that the site was a "good place" for a school and that there would be "no problems" putting Fairfax Christian School there. J.A. 1527. Rev. Thoburn purchased the Oakton site and some surrounding land with the proceeds received from the sale of the Pope's Head Road property and with borrowed money. J.A. 1523-25.

Under the county zoning ordinance, Fairfax Christian School had to obtain a "special exception" before it would be allowed to occupy residential property.[3] Special ex-

[3] A "special exception," despite its name, is a relatively common zoning permit that is needed to establish a wide variety of uses. [Continued]

ception applications to build Fairfax Christian School on the Oakton property were submitted to respondent Fairfax County Board of Supervisors for decision in 1985 and in 1987.[4] The first was denied on a 4-to-4 vote by the nine-member body; the second was denied by a 5-to-4 vote. J.A. 1535-37, 3377.

Citizen opposition to relocating the school in that neighborhood came not only from those living in the surrounding "very large estates," but from others who lived as far as 12 miles away. J.A. 1535. The principal public reason given by Board members for denial of the special exceptions was that the proposed Fairfax Christian School campus was not in harmony with the county's Comprehensive Plan, allegedly because the school would create an unacceptably high intensity of use on the 40 acres, increase surrounding area traffic and cause environmental problems by having portions of two ballfields in a 100-year flood plain of an Environmental Quality Corridor. J.A. 1535-37, 3496-99. At the hearings on the special exception applications, evidence was given of county approval of school uses that created greater intensities of use, traffic and environmental effects.[5] J.A. 3383-85.

While attempting to obtain approval for the Oakton site, Fairfax Christian School was located in temporary

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[3] [Continued]

A special exception is needed in *all* residential districts in Fairfax County to establish a "private school of general education" that has an enrollment of 100 or more students daily. Fairfax County, Va., Zoning Ordinance 9-301, 9-302. App. at 53a, 54a. Residential districts comprise more than 90 percent of all zoned land in Fairfax County. J.A. 1729, 1765; *see also* Brief of Appellants at 15-16.

[4] The 1985 action by the Board is barred by the statute of limitations. The evidence that was admitted was offered by petitioners to show an alleged pattern.

[5] Evidence was offered at trial to show that both public and private schools and uses were approved by the county respondents despite similar, or far worse, intensity, traffic, or environmental effects. Virtually all of this evidence was excluded by the trial court. J.A. 1413-21, 1950-83, 2073-76.

quarters at Temple Baptist Church and Jerusalem Baptist Church in Fairfax County on Route 123. J.A. 1525-26, 1540-41. In early 1988, respondent county sent a letter to Jerusalem Baptist Church inquiring into that Church's tax exempt status because of the location there of Fairfax Christian School, which pays taxes as a for-profit organizational structure. J.A. 1544-48, 3505. As a result of that inquiry, Fairfax Christian School lost its lease at the end of the school year and had no place to meet in the fall. J.A. 1544-48, 1766.

To provide another temporary location for the school in the county, renovations were begun in 1988 on three residential houses on 29 wooded acres on Hunter Mill Road near the Dulles Toll Road. J.A. 1548-50. This property was owned by members of the Thoburn family. *Id.* The modifications of the houses into school buildings were performed under residential, not commercial permits, but according to the higher, commercial standards applicable to a school. J.A. 1550. County Executive Lambert admitted at trial that there was nothing illegal about making such modifications under residential permits. J.A. 1717-19, 2068. Respondent county sent commercial as well as residential inspectors to inspect the Hunter Mill Road properties and, with knowledge that the Thoburns intended to build a school there, the county allowed renovations to proceed without significant issue until September. J.A. 1550, 1943-44.

On August 30, 1988, the Thoburns learned that The *Washington Post* would publish the next day an article about the potential for Fairfax Christian School opening up that fall at the Hunter Mill Road site without fulfilling all county zoning requirements. J.A. 1555, 1717-19. Concerned about the effect of this article on already-strained relations with the county government, members of the Thoburn family went to Mr. Lambert immediately and assured the County Executive that the school would not be opened until the county was satisfied that all safety requirements were met. J.A. 1555-56, 1717. What

they hoped for, they said, was to complete all necessary modifications to the buildings on the site, have them inspected for safety and receive, as an accommodation to their religious interests, temporary permission to open the school while the special exception application papers were being processed. J.A. 1554-56. County Executive Lambert said that he would get back to the Thoburns. He did, two days later. Despite the Thoburns' assurance that the school would not be opened without county approval, suit papers were served on the unsuspecting and unprepared Thoburn family. J.A. 1556-57. At the same time, statements impugning the motives of the Thoburns and raising questions about the safety of the school site were given to the press by county officials and reported publicly. J.A. 1756-58, 1942. On September 13, 1988, the Thoburns were enjoined from opening Fairfax Christian School at the Hunter Mill Road site. J.A. 1559, 1856. An injunction action of this type against a school was unprecedented in the county. J.A. 1721.

Also unprecedented was the county's institution at this time of low-level and loud helicopter surveillance above the proposed school site and the Thoburns' nearby personal residences, an action that upset and intimidated them. J.A. 1485, 1557, 1720, 1940-41, 2035-36. County Executive Lambert claimed to know nothing about such surveillance and admitted that it "would have no value on that type of operation." J.A. 1720. County inspectors also were sent to inspect the area regularly, despite the helicopter surveillance. *Id.*

Left again with no place to conduct their religious school, the Thoburns were invited by the pastor of the Vienna Assembly of God Church to move Fairfax Christian School into the facilities operated by that church in Vienna, a town located within Fairfax County. J.A. 1560, 1666, 1833-36, 1840-41. These facilities consisted of a three-story administration and classroom structure attached to a large church sanctuary. J.A. 1562. During the summer, the church conducts a Bible school at that location. J.A. 1840-41.

To try to ensure that there would be no problem accepting the church's invitation to relocate the entire Fairfax Christian School student body in the church property, members of the Thoburn family met with Gregory Hembree, the Vienna Director of Planning and Zoning, on September 16, 1988. J.A. 1562-64, 1667, 1777-78. Mr. Hembree assured the Thoburns that, although it would be a technical violation to move the entirety of Fairfax Christian School into the church facilities right away, they could do so and the town would accommodate them by its usual procedure of noting the violation and giving them 30 days to gain the expected approval. J.A. 1668-72, 2129. The now-wary Thoburns immediately confirmed this advice in writing to Mr. Hembree and applied for the expected approval to move the entire student body of Fairfax Christian School into the Vienna Assembly of God Church. *Id.* By this time, the use of temporary facilities, uncertainty and bad publicity had decreased the student body to approximately 225 children. J.A. 1672.

The remaining Fairfax Christian School students were moved into the church on September 20, 1988, while approval from respondent Vienna Board of Zoning Appeals was pending. J.A. 1672. The next day, county officials appeared, seeking to inspect the church buildings that were occupied by Fairfax Christian School students and teachers. J.A. 1677-79, 1744-47, 2242. The inspectors were from the Fairfax County Fire Marshal's office, which was allegedly acting as the fire marshal of Vienna pursuant to an ordinance and agreement between the two jurisdictions. *Id.* They made an inspection that lasted only several minutes and issued a written order for immediate evacuation by the religious school; it cited no violations in the space provided therefor. *Id.* The government inspectors also refused to provide school officials with the reasons for their order when asked. *Id.* After a subsequent inspection, a list of alleged "violations" was provided to the school the following day, September 22. J.A. 1748-49, 3810, 3811.

Despite strenuous efforts by the school's attorney to reach an accommodation with the town and prevent another damaging suit—including offers to suspend classes voluntarily while suggested changes were made—the Thoburn family and the church pastor were sued the next day, Friday, September 23, in an action to close down the religious school's operations. J.A. 1566-67, 1750, 1841, 1860-62, 1876-77. It was an unprecedented action by Vienna. J.A. 1798-99. County attorneys worked with the town attorneys on the case. J.A. 1725-28.

Again, there was considerable negative publicity generated by statements to the press from town officials about the dangerous condition of the school. J.A. 1756-58, 1941-42. Round-the-clock efforts through the week and over the weekend were made to comply with the inspectors' notations for action, and virtually all of these items had been completed by the time of the injunction hearing. J.A. 1670, 1681, 1750-54, 1941, 2119, 2121-25, 2241, 3818-19. Nonetheless, the following Tuesday, September 27, 1988, the same county judge who had enjoined Fairfax Christian School from operating at the Hunter Mill Road site enjoined the school from operating at the Vienna Assembly of God Church. J.A. 1566, 1568.

This extraordinary prohibition was imposed despite the fact that the permitted occupancy load of the church building in which the school had been located was more than twice the number of people in the school. J.A. 1840. The "violations" on which the injunction was based came about because the county Fire Marshal's office interpreted the church's act of charity as a change in use. J.A. 1897-1903. That is, the church let an *outside* religious school occupy its property, as opposed to having its own Bible school do so, thereby causing the church to lose the grandfathered status that exempted it from building regulations promulgated after the church's completion. *Id.* Moreover, contemporaneous county records showed that the same county Fire Marshal's office had cited at least a dozen public schools as having had violations of the

same or greater seriousness and extent as the Fairfax Christian School "violations" in Vienna, but the public schools never had been evacuated; instead, they always were given time to correct the violations. J.A. 1909-10, 2090-2117, 2797-2833.

Once again, Fairfax Christian School was left with no place to conduct classes. It became even more nomadic. For two weeks, the school took its students on field trips to museums and monuments, while efforts were made to gain approval from respondent Vienna BZA to re-enter Vienna Assembly of God Church. J.A. 1566-67, 1572, 1755. After operating under a series of temporary permits for a year, the school did gain such BZA approval in May of 1989, but only for 174 students and under new restrictions. J.A. 1573-74, 1683-85, 3829.

One of these restrictions was an unprecedented and unexplained prohibition that barred Fairfax Christian School from continuing to use the church sanctuary for Bible lessons and any other instruction; inexplicably, the only thing that students and teachers could do in the church sanctuary was to use "musical instruments." *Id.* Other regular users of the sanctuary, including hundreds of people who attended Sunday services, were not prohibited from being in the sanctuary for any purpose.

During this period, the county attempted to convince Rev. Thoburn that he should locate Fairfax Christian School in a commercial or industrial area of the county, rather than in the more than 90 percent of the county that is zoned residential and in which all public schools are located. J.A. 1569-72, 1721-23, 1728-29; *see* note 3, above. The County Executive actually suggested that Fairfax Christian School be housed in a run-down, bullet-ridden vacant building in a crime- and drug-infested commercial area at Bailey's Crossroads. J.A. 1569-72, 1721-23, 2021-22. This was rejected by Rev. Thoburn as a totally inappropriate environment for young girls and boys. J.A. 1569-72. Mr. Lambert also thought that the school should be put in a commercial warehouse and

found it amusing that sending religious children to school in crime-infested commercial areas could be considered controversial. J.A. 1721-22.

In December of 1988, Rev. Thoburn submitted yet another special exception application to respondent County Board of Supervisors requesting the following uses: (1) to locate Fairfax Christian School at the Hunter Mill Road site; (2) to allow petitioner Christ College to use the Fairfax Christian School facilities there during evenings and Saturdays to teach up to 50 students college-level courses, and (3) to allow use of the school facilities for free adult literacy classes, one of Mrs. Thoburn's areas of expertise. J.A. 1576, 1627-28. A special exception for Fairfax Christian School was granted by the Board on May 8, 1989, but with severe conditions. Christ College and the adult literacy classes were prohibited by the Board, which also imposed numerous pre-conditions to final approval and occupancy of the site by the school.[6] J.A. 1577-88, 1633-36, 2493, 3618, 3722-23; App. at 60a-65a. As a result, as of the time of the trial and appeal below, Fairfax Christian School still had not been able to obtain permission to locate the school in any residential area of the county. Brief of Appellants at 9.[7]

Judicial Proceedings Below

This Court issued its decision in *Smith* on April 17, 1990. Trial of this case was scheduled to begin May 7. On April 30, petitioners filed revised proposed jury instructions that reflected *Smith*, emphasizing this Court's discussion of hybrid rights. On May 2, petitioners submitted to the trial court a "Trial Brief on the Right to the Free Exercise of Religion in Educating Children," together with a motion for leave to file the brief. The

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[6] Christ College was dismissed for lack of standing following the defendants' second motion to dismiss. App. at 24a-25a.

[7] Fairfax Christian School did begin limited operations for some students at the Hunter Mill Road site in the spring of 1991, after the appellate record below closed.

brief focused on hybrid rights as interpreted by *Smith*, including this Court's recognition of the use of the strict scrutiny balancing test in *Wisconsin v. Yoder*, 406 U.S. 205, 215, 233 (1972). On the evening before trial, the county respondents served a motion in limine to prevent arguments and evidence relating to balancing and less-restrictive means tests, citing petitioners' *Smith* brief as the focus of their concern, and interpreting *Smith* as favorable to their position. The trial court stated that it did not wish to consider *Smith*-related issues until after hearing the evidence. J.A. 1432-35.

At the close of petitioners' trial evidence on May 9, 1990, respondents moved for a directed verdict. During the arguments on this motion, both sides relied upon *Smith* as being dispositive of their case. The petitioners argued that protection of hybrid rights required a strict scrutiny balancing test based upon facts found by the jury. J.A. 2066-67. The respondents argued that neutral laws of general applicability could no longer be challenged under the Free Exercise Clause. J.A. 2088. The respondents' directed verdict motion was granted. The trial court's five-minute oral decision did not mention *Smith* or any other case, did not posit any constitutional test (other than whether the regulations were "reasonable") and did not rule on petitioners' Establishment Clause claims at all.

In the Fourth Circuit, both sides again relied on *Smith*, arguing opposite effects. Brief of Appellants at 11, *et seq.*, Brief of Appellees at 19, *et seq.* That appeals court, in an unpublished opinion, affirmed the trial court. In doing so, it based its analysis on the erroneous finding that petitioners' "claim is based on their reading of *Sherbert v. Verner*, 374 U.S. 398 (1963)," App. at 7a, rather than *Smith* and *Yoder* on which the respondents expressly relied instead.[8] The Fourth Circuit did briefly address

[8] Petitioners only briefly cited *Sherbert's* historical role in their briefs to the Fourth Circuit and, on information and belief, that case never was cited in oral argument. In Petitioner-Appellants'

Smith, but only as an inapposite criminal statute case that would have to be expanded into a non-criminal context to determine whether the petitioners' claim implicated hybrid rights. *Id.* at 8a. In this notation, the appeals court mistakenly characterized petitioners' heavy reliance on *Smith* as a mere suggestion made to the court out of a concern that the case cast doubt on petitioners' claims.[9]

REASONS FOR GRANTING THE WRIT

There are three major reasons why the writ of certiorari should issue to review the profoundly erroneous decisions below that are at odds with contemporaneous religious liberty decisions of other federal and state appeals courts. First, this is a "hybrid rights" case requiring strict scrutiny. The court of appeals, despite petitioners' urgings, failed to analyze this case as a hybrid rights case, and failed to state what constitutional test or level of scrutiny should apply. Second, this case does not present a facial challenge to a generally applicable, religiously neutral law, as the court of appeals mistakenly assumed.[10] It presents a challenge to discretionary governmental actions, under color of law, "as applied" to petitioners. The laws in question were not enforced in a religiously neutral manner. Furthermore, they are not "generally applicable," as was the penal statute in *Smith*, because these civil laws allow for, and are enforced by, highly individualized determinations. Third, in reviewing

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Brief, a *Smith* citation to *Sherbert* was mentioned in passing only in footnote 1. In Appellants' Reply Brief, *Sherbert* was cited, at 6, as the first compelling interest test decision, and, at 12, in a parenthetical that notes that a case being relied upon had quoted *Sherbert*. Those were the only references to the case made by petitioners.

[9] "Appellants, perceiving that their free exercise claim might be cast into doubt by *Employment Division v. Smith*, suggest that the various actions at issue here impaired both free exercise rights and the right of parents of FCS students to educate their children as they see fit." App. at 8a.

[10] *See* note 17, below.

the granting of a directed verdict against petitioners, the court of appeals *ignored* the evidence of burden on religiously-compelled conduct that petitioners presented in the trial court. Neither of the courts below distinguished between, on the one hand, whether a burden on religious conduct had occurred and, on the other hand, whether that burden was justified by a sufficient governmental interest. These should be recognized as entirely separate questions.

I. THERE IS A CONFLICT AMONG THE CIRCUITS ON APPLYING *SMITH* TO CIVIL LAWS AND TO "HYBRID RIGHTS" CASES

In *Smith*, this Court held that a neutral, generally applicable and otherwise valid law that proscribes socially harmful conduct ordinarily will not be open to challenge under the Free Exercise Clause alone, when that law incidentally proscribes conduct that, for some religious adherents, has religious significance.[11] *Smith* made it equally clear that even a challenge to a neutral, generally applicable law may well prevail when the law infringes upon a "hybrid right." *Smith*, 110 S. Ct. at 1601-02.[12]

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[11] As shown below, this case does not involve a challenge to religiously neutral, generally applicable laws. The challenge is not to the ordinances *themselves* under which the governmental actions were taken, but to the discriminatory and burdensome way in which those ordinances were *applied* to petitioners. *See* Part II and note 17, below. Determination that a hybrid right exists here is nevertheless critically important to a proper analysis under *Smith*. If the existence of a hybrid right invokes *Yoder*-style strict scrutiny, even when the challenge is to a neutral, generally applicable law, strict scrutiny is *a fortiori* even more appropriate when no challenge to neutral, generally applicable laws is involved.

[12] While announcing a general rule against challenges to neutral, generally applicable statutes when the challenge is based on the Free Exercise Clause alone, this Court recognized two separate protected areas in which free exercise claims may prevail. The first is the "hybrid rights" protected area discussed in the accompanying text. The second protected area is where the government has in place a mechanism, as in unemployment compensation cases, for making "individualized governmental assessments." In these, accommodations in instances of "religious hardship" are therefore possible. *Smith*, 110 S. Ct. at 1602-03. This "individualized deter-

Such a right combines "the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech . . . or the right of parents, acknowledged in *Pierce v. Society of Sisters* . . . to direct the education of their children, *see Wisconsin v. Yoder*. . . ." *Id.* at 1601 (citations omitted).[13]

If any case can ever involve such a hybrid right, this is the case. The suit was brought by religious missionaries who founded, administered, and taught at a religious school in order to educate their own children and other children in the word of God, by parents who were religiously motivated to send their children to that school, and by a religious student. All education at the school is based on the Bible. The uncontradicted evidence at trial showed that Fairfax Christian School serves the religious and familial needs of parents who send their children there, that no other religious school in the area meets those religious needs, and that petitioner parents could not, consistent with their religious beliefs, send their children to the Fairfax County public schools.

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mination" protected area is founded upon *Sherbert v. Verner*, 374 U.S. 398 (1963), and requires the government to engage in a compelling interest balancing test. *Id.* The governmental determinations complained of in this case—denial of special exceptions, issuance of the evacuation order, the decisions to institute legal proceedings, application of building codes through on-site inspections, and imposition of unjustified conditions in the special exceptions and occupancy permits that were issued—are all individualized determinations of this type. However, as argued to the Fourth Circuit, it should not be necessary to decide whether the principles of this second protected area are applicable, because this case so clearly involves "hybrid rights."

[13] This Court held that, under the *Smith* facts, there was no such "hybrid situation, but [that case presented] a free exercise claim unconnected with any communicative activity or parental right." *Smith*, 110 S. Ct. at 1602. The Court was careful to reiterate that there was no contention that the Oregon peyote law at issue in that case represented an attempt to regulate "the communication of religious beliefs, or the raising of one's children in those beliefs . . . ." *Id.*

Thus, as in *Pierce* and *Yoder*, this case implicates in the most direct manner the right of parents to control the religious upbringing of their children. The conduct sought to be protected also involves—through religious exercises, prayer, teaching, and learning at the school—the communication of religious ideas and beliefs. This case therefore falls within the protection of "both lines of cases" (the "free speech" and the "parental rights" lines) recognized in *Smith* as involving hybrid rights, as to which a strict scrutiny balancing test must be applied. *Smith*, 110 S. Ct. at 1601 n.1. This Court approvingly noted the strict scrutiny standard set forth in *Yoder*:

> *Yoder* said that "the Court's holding in *Pierce* stands as a charter of the rights of parents to direct the religious upbringing of their children. And, when the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a 'reasonable relation to some purpose within the competency of the State' is required to sustain the validity of the State's requirement under the First Amendment." 406 U.S. at 233.

Smith, 110 S. Ct. at 1601 n.1. As in *Yoder*, any infringement on free exercise rights, when combined as a "hybrid" with parental rights or the right to communicate ideas, can be justified, if at all, only by governmental "interests of the highest order" of a kind "not otherwise served" that "overbalance legitimate claims to the free exercise of religion." [14]

The court of appeals in the instant case declined to analyze and decide this case as a hybrid rights case. Instead, it offered a series of mischaracterizations of peti-

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[14] 406 U.S. at 215. The *Yoder* test employs concepts similar to the "compelling state interest" and "least restrictive means" tests of *Sherbert* and its progeny, although by its use of terms like "the *highest* order" *Yoder* appears to establish a level of scrutiny even more demanding than the *Sherbert* line of cases. *Compare Sherbert v. Verner*, 374 U.S. 398, 403, 406 (1963) ("compelling state interest"); *Thomas v. Review Board*, 450 U.S. 707, 718 (1981) ("least restrictive means").

tioners' legal contentions, and then purported to apply some unknown, unstated free exercise test that requires petitioners to show that "the zoning *laws* or fire *codes* burden their exercise of religion." App. at 8a (emphasis added).[15]

The Fourth Circuit's failure to apply any recognized free exercise test, or even to state what test it was purporting to apply, apparently derives from its stated uncertainty as to whether the constitutional analysis in *Smith* has any application outside the realm of challenges to *criminal* statutes. The court's analysis began with the incorrect premise that petitioners' claims were "based on their [petitioners'] reading of *Sherbert v. Verner*. . . ." App. at 7a. It proceeded from there to a debatable interpretation of this Court's holding in *Smith* that is inconsistent with those in other Circuits: In *Smith*, the Fourth Circuit found, this Court "did not address . . . the continued vitality of *Sherbert* in free exercise challenges that, like this one, involve non-criminal state regulation." App. at 8a.[16] The court below then concluded that it need not decide "whether *Sherbert* remains good law with respect to neutral, non-criminal state regulations." *Id.* The Fourth Circuit did not even men-

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[15] Petitioners' challenge to these laws is "as applied," not facial. *See* Part II and note 17, below.

[16] The framework for constitutional analysis provided by *Smith* does not distinguish between criminal and civil cases. The Fourth Circuit nevertheless expressed open doubts about *Smith*'s application in non-criminal cases and declined to apply *Smith*'s analytical framework in this case. By contrast, the Second, Third, Sixth, Eighth, and Ninth Circuits squarely have recognized the applicability of *Smith* analysis in non-criminal cases. *See, e.g., St. Bartholomew's Church v. City of New York*, 914 F.2d 348, 353-56 (2d Cir. 1990); *Salvation Army v. New Jersey Dep't of Community Affairs*, 919 F.2d 183, 194-96 (3d Cir. 1990); *Vandiver v. Hardin County Board of Educ.*, 925 F.2d 927, 931-34 (6th Cir. 1991); *Cornerstone Bible Church v. City of Hastings*, U.S. App. LEXIS 26060, at *21-24 (8th Cir. 1991); *NLRB v. Hanna Boys Center*, 940 F.2d 1295, 1305-06, *rehearing en banc denied*, U.S. App. LEXIS 25359 (9th Cir. 1991).

tion *Pierce*, *Yoder*, or any other of the free speech or parental rights cases that formed the basis for the hybrid rights protected area recognized in *Smith*, and upon which petitioners expressly predicated their appeal.

Other federal courts of appeals have not hesitated to recognize hybrid rights cases, and to analyze them as such, when, as here, facts clearly implicating hybrid rights are presented. *Cornerstone Bible Church v. City of Hastings*, U.S. App. LEXIS 26060, at *24 (8th Cir. 1991) (recognizing hybrid right based on religious free speech in zoning case); *Salvation Army v. New Jersey Dep't of Community Affairs*, 919 F.2d 183, 186, 196-201 (3d Cir. 1990) (examining hybrid claim of free exercise in conjunction with freedom of association); *compare NLRB v. Hanna Boys Center*, 940 F.2d 1295, 1305-06, *rehearing en banc denied*, U.S. App. LEXIS 25359 (9th Cir. 1991) (recognizing *Smith* but, as did Fourth Circuit, declining to decide whether hybrid rights analysis should be applied). The courts of last resort of the states also have recognized such hybrid rights. *State v. DeLaBruere*, 154 Vt. 237, 577 A.2d 254, 261 n.8 (1990); *see also State v. Hershberger*, 462 N.W.2d 393, 396-97 (Minn. 1990) (en banc) (recognizing hybrid rights, but deciding case under the Minnesota Constitution because of "uncertain meaning" of *Smith*).

Thus, the Fourth Circuit on this issue has rendered a decision in conflict with other courts of appeals, has decided a federal question in a way that conflicts with a state court of last resort, and has decided a federal question in a way that conflicts with the applicable decision of this Court. *See* U.S. Supreme Court Rule 10.1(a), (c).

Petitioners also respectfully submit that the Fourth Circuit's failure to identify the constitutional test that it was applying, its characterization of petitioners' argument as relying on one line of cases on which they did not rely, while not even mentioning the line of cases on which petitioners did rely, and its failure to follow, or even employ, the analysis set forth in the leading case

decided by this Court, "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." U.S. Supreme Court Rule 10.1(a).

II. THERE IS A CONFLICT AMONG THE CIRCUITS RELATING TO "AS APPLIED" CHALLENGES BROUGHT AFTER *SMITH*

One of the most fundamental defects in the analyses by both courts below is their interpretation of this case as a direct, facial challenge to zoning and building code ordinances, and apparent rejection of the concept of an "as applied" challenge, which was the point argued. Petitioners do not claim, and never have claimed in this litigation, that religious schools should be exempt from zoning or building code laws generally. Petitioners do not challenge the inherent constitutionality of the particular ordinances here involved.[17] Petitioners *do* claim that the unfair, discriminatory, harsh and unprecedented manner in which those ordinances and codes were *applied to* and *enforced against* petitioners has burdened their constitutional freedom to engage in religiously mandated conduct.

In their brief to the Fourth Circuit, petitioners expressly disagreed with the trial court's characterization of the issues when it found that the "regulations *themselves*" (emphasis in brief) had not "affected" petitioners' religious conduct. Brief of Appellants at 18 (quoting trial court's decision). Petitioners pointed out that "[i]t has never been the law that only requirements that *facially* discriminate against religious conduct result in a burden on that conduct." *Id.* (quoting *Yoder*'s admonition, 406 U.S. at 220, that a law neutral on its face

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[17] Petitioners initially pled a limited facial challenge to certain statutes and ordinances, in addition to their far more extensive "as applied" challenges. However, on appeal to the Fourth Circuit, only one paragraph of petitioners' 50-page appellate brief was devoted to these limited facial challenges, and that paragraph merely noted that the trial court had failed to rule on those challenges. Brief of Appellants at 30.

may "in its application" burden the free exercise of religion). To make it even clearer that an "as applied" rather than a facial challenge was being mounted, petitioners noted that the free exercise count of their complaint was "devoted almost exclusively to alleging that the 'actions' and 'pattern of conduct' of Defendants under color of state law had the 'effect' of burdening Plaintiffs' exercise of their religious beliefs." *Id.* (quoting from Second Amended Complaint, which was reproduced at J.A. 1163-1217).[18]

Contrary to the refusal of the Fourth Circuit to do so, other Circuits have recognized and entertained "as applied" challenges in post-*Smith* free exercise cases. In *St. Bartholomew's Church v. City of New York*, 914 F.2d 348, 352-53 (2d Cir. 1990), the Second Circuit noted that the district court had dismissed a church's facial free exercise challenges to a local land use ordinance, but had held a bench trial on the "as applied" claims. The Eighth Circuit, in a post-*Smith* prisoner free exercise case, expressly distinguished between "the validity of the policy itself" as opposed to "the way it was applied" to the plaintiff. *Salaam v. Lockhart*, 905 F.2d 1168, 1173 (8th Cir. 1990) (evaluating prisoner's free exercise claim under *Turner v. Safley*, 482 U.S. 78 (1987).[19] *See also*

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[18] Petitioners' Reply Brief in the Fourth Circuit restated in the clearest terms that an "as applied" challenge was being asserted:

> However, as the Plaintiff religious families have made clear, they do not have religious objections to all of the specific requirements of the zoning and building regulations at issue in this case. *They do object in the strongest possible way to the manner in which those regulations have been unjustly interpreted, discriminatorily applied, and unfairly enforced against them.*

Reply Brief at 8 (emphasis added).

[19] An ironic observation in this Eighth Circuit opinion indicates a need for clarifying *Smith*:

> *Smith* does not alter the rights of prisoners; it simply brings the free exercise rights of private citizens closer to those of prisoners.

905 F.2d at 1171 n.7.

Moore v. Trippe, 743 F. Supp. 201 (S.D.N.Y. 1990) (post-*Smith* case recognizing free exercise cause of action for discriminatory enforcement of local zoning and building laws). Because of this conflict among the Circuits, because this Court's own applicable precedents recognize "as applied" free exercise challenges,[20] and because the Fourth Circuit's misconstruction of this case as a facial challenge vitiated its analysis, certiorari should be granted.

III. THERE IS CONFUSION IN THE CIRCUITS ON WHAT CONSTITUTES A COGNIZABLE BURDEN ON RELIGIOUSLY-MOTIVATED CONDUCT

The most incomprehensible aspect of the Fourth Circuit's decision below is its central point: Petitioners had not shown a burden on religiously-motivated conduct. In part, this astonishing holding must result from a fundamental misconception of the case as a facial challenge to zoning and building code laws generally.[21] But peti-

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[20] *See Yoder*, 406 U.S. at 220. A refinement should perhaps be noted. There may be at least two different ways in which a "facially neutral" statute may, "as applied," violate free exercise or hybrid rights. The first is when a statute that does not mention religion will result *necessarily*, by the nature of the conduct compelled or prohibited, in an infringement on free exercise rights. Both *Yoder* and *Smith* are examples. The second—which is present in this case—is when a statute that does not mention religion is used by governmental officials, vested with great discretion, to single out an individual, group, or institution and impose substantial, harsh, and discriminatory burdens on their religiously-motivated conduct. Such burdens are not merely "incidental" as in *Smith*. Operating a religious school is not an activity that the government has the *per se* power to ban, as it may ban peyote use. *See Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

[21] The Court of Appeals misconceived the challenges in this case as merely reflecting petitioners' "preference" to locate the school in a residential zone, where a special exception is required. App. at 9a. As indicated in the Statement of the Case, more than 90 percent of the land in Fairfax County is zoned residential and all public schools are located in residential zones. Most industrial and commercial land would not be suitable for a school. Fairfax County, with all of its land use resources, could locate only two such potential parcels

tioners provided extensive proof that the heavy-handed, discriminatory application of these laws to them by respondents burdened their religious conduct in the most severe ways.[22]

The respondents in this case *shut down a religious mission school.* Government officials stormed into a religious mission school, announced that classes must cease, that everyone must get out, and that school was suspended indefinitely. Then, despite pleas by school officials and attorneys to work out arrangements to keep the school functioning while government demands were being satisfied—even to allow the school to suspend classes temporarily to avoid suit—respondents nevertheless rushed to obtain a court order closing the school down. Surely, this evacuation and closure alone is ample *prima facie* evi-

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in non-residential zones, neither of which was suitable for young children. In any event, Fairfax Christian School was entitled to be treated fairly on its special exception application in Oakton, regardless of whether alternative sites might have been available.

[22] The Fourth Circuit opinion ignores this proof. The evidence of burden was set forth at length in the Brief of Appellants in the appeal to the Fourth Circuit, and was recapitulated in the Reply Brief. Extensive testimony on burden, with related exhibits, was contained in the Joint Appendix on that appeal.

A verdict may be directed only when—without weighing the credibility of the witnesses—there can be but one reasonable conclusion. When, as here, there is sufficient evidence in conflict so that reasonable men could reach different conclusions, a directed verdict is not proper. *See Brady v. Southern R.R.*, 320 U.S. 476, 479-80 (1943); *Lewis v. City of Irvine*, 899 F.2d 451, 455 (6th Cir. 1990); *Swentek v. USAIR, Inc.*, 830 F.2d 552, 562 (4th Cir. 1987) (directed verdict in second trial improper); *Garment District, Inc. v. Belk Store Servs., Inc.*, 799 F.2d 905, 906 (4th Cir.), *cert. denied*, 486 U.S. 1005 (1986). The trial court, and appellate court on *de novo* review, must consider the evidence in the light most favorable to the party against whom the verdict is directed, with all reasonable inferences being made in favor of that party. *See, e.g., Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690 (1962); *Gunning v. Cooley*, 281 U.S. 90 (1930); *Garment District*, 799 F.2d at 906.

dence that religious learning, speech, and other religiously-motivated conduct had been hampered. That burden was heightened when, as here, parents of the students at that school had no other school to which they could send their children without violating their religious beliefs, but yet were required by law to send their children to school.

Shutting down a religious school should be recognized as a burden on the religiously-motivated conduct being exercised at that school, and a burden on the hybrid rights of religiously-motivated parents who send their children there. It is an entirely different question as to whether there might have been, on balance, governmental *justification* for shutting down the school and for imposing the other burdens on religious conduct cited by petitioners in this case. The answer to that question is impossible to ascertain on this record because the respondents never were put to their proof; the trial court improperly granted a directed verdict after the close of petitioners' evidence.[23] No one can ascertain what the government's true interests were in shutting down the school and otherwise burdening petitioners' religiously-motivated conduct—whether they were of "the highest order" or pretextual as alleged, and whether those actions were necessary or could have been "otherwise served" by less restrictive actions. In short, the court of appeals failed to make the elementary distinction between the existence of a burden on conduct, and whether that burden had been justified.[24]

Other types of governmental actions that were proved in this case should have been recognized by the Fourth

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[23] *See* discussion in note 22, above.

[24] The existence of a burden on religiously-motivated conduct is a question of fact to be determined by the fact-finder; in this case, the jury. *Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855, 871 (2d Cir. 1988), *cert. denied*, 489 U.S. 1077 (1989).

Circuit—and should be recognized by this Court—as legally cognizable burdens on religiously-motivated conduct. These include:

- The institution of an unwarranted, publicly-proclaimed action to enjoin the occupancy of a vacant religious school run by missionaries who had promised not to open it until it was approved;
- Denial on pretextual grounds of two applications to establish a religious school in a residential area;[25]
- Harassment of churches that housed a religious school temporarily, causing the school to lose its temporary home, with no hope of obtaining timely zoning approval for any other location under drawn-out local special exception procedures;
- Direct interference with religious observances and education, by prohibiting a religious school's use of a church's sanctuary for Bible and other lessons,

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[25] The reasons given on the record for denial of these two applications were thin, at best. The probable real reason is not only religious but political animosity against Robert Thoburn and his family, who had been active as conservative candidates marshaling the "religious right" electorate in Fairfax County and Virginia politics. Petitioners, had they been permitted to do so, would have introduced sworn testimony and contemporaneous written documentation that Robert and John Thoburn were approached by County Planning Commissioner Carl Sell, on behalf of defendant Board of Supervisors member Joseph Alexander, with an offer to approve the special exception for the school in 1987 if Robert Thoburn would withdraw his candidacy for the Board of Supervisors. This evidence described the date, time, and place of the meeting with Planning Commissioner Sell in detail, and contained notes of telephone conversations that John Thoburn had with representatives of the Federal Bureau of Investigation, whom he contacted immediately after this alleged political bribe was offered. Shortly after Robert Thoburn rejected this "offer," the second special exception application was denied by a 5-4 vote, with Commissioner Alexander casting the decisive negative vote. This probative evidence of improper decision-making was excluded by a pretrial motion in limine on grounds that it would be "prejudicial." J.A. 1077, 1092-96, 1119.

with no reason ever having been given for that prohibition;

- A loss of two-thirds of a religious school's students due to years of repeated zoning denials and legal and administrative harassment;
- Extensive adverse publicity and loss of goodwill for a religious school, due to false characterizations of the school officials as people who would endanger the lives of children; [26]
- Intimidation tactics such as the use of helicopter surveillance by government officials over the proposed site of a religious school and the homes of the missionaries who ran it; [27]
- Unnecessary and harmful delay in granting permission to open a religious school, including imposition of expensive and unwarranted conditions; [28] and
- Extensive financial losses from improper governmental actions against a religious school and those associated with it, running to approximately $700,000 each year, exclusive of legal fees, for the two years preceding the trial.[29]

Yoder commands that, when religious rights such as those present in the instant case are infringed, courts

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[26] When petitioners attempted to show the magnitude and severity of the newspaper campaign conducted against them by respondents, the trial court refused to allow the newspaper articles to be placed in evidence as proof of burden and damages, stating: "He has testified that there was press coverage and that had some adverse effect." J.A. 1758.

[27] At trial, the Assistant County Attorney boasted of the use of county helicopters for these overflights. J.A. 1485.

[28] The letter granting the special exception to Fairfax Christian School is reproduced at App. 60a-65a.

[29] J.A. 1575, 1584. In addition, Robert Thoburn sustained a loss of approximately $2 million due to the failure of a covenant to build a Christian school on the Oakton property upon which the county twice denied him permission to build the school. J.A. 1582.

must "searchingly examine the interests that the State seeks to promote." 406 U.S. at 221. The courts below rejected this still-valid mandate and adopted a government-is-always-right rule.[30]

This Court, other federal courts of appeals, and state courts of last resort have recognized burdens on religious conduct under facts not remotely as compelling as those presented to the Fourth Circuit in this case. This Court has found burdens on religious conduct to exist when all that was involved was a denial of monetary *benefits* to which an individual might otherwise be entitled. *Sherbert*, 374 U.S. at 403; *Thomas*, 450 U.S. at 716-18; *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 139-40 (1987). Surely, evidence of a burden on religious conduct sufficient to survive a motion for directed verdict has been presented when the uncontested facts show the actual closure of the school, huge financial losses, severe loss of enrollment, and the pattern of intimidation and harassment described above. *See also Pierce*, 268 U.S. at 534-36 (effect on religious school's business and property, as well as effect on parents' interest in directing upbringing of children, recognized by Court).

In post-*Smith* decisions, courts of appeals also have recognized burdens on religious conduct where the interference does not even approach that presented to the

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[30] The court of appeals' entire analysis of the building code issues was as follows:

> [Petitioners] failed to establish how conforming to local fire and safety codes could impair the religious mission of FCS. As we have noted, regulations "manifestly and properly concerned only with the health, safety, and welfare of children" cannot "be held to impinge on any currently known or practiced religious beliefs under free exercise protection."

App. at 9a (citation omitted). This statement incorrectly treats petitioners' claims as a facial challenge to local fire and safety codes, and ignores the extensive evidence that was presented of the burdens created by the unjustified application of these codes. *See* Part II and note 17, above.

Fourth Circuit here. *United States v. Board of Educ. of Philadelphia*, 911 F.2d 882, 889 (3d Cir. 1990) (Title VII case; prohibition against school teacher's wearing religious garb burdens free exercise; any contention to the contrary "could not be seriously maintained"); *Cornerstone Bible Church v. City of Hastings*, U.S. App. LEXIS 26060 at *5-6, *21-24, *28 (8th Cir. 1991) (zoning exclusion of churches from central business district; case reversed and remanded for consideration of hybrid rights claim); *State v. DeLaBruere*, 154 Vt. 237, 577 A.2d 254, 262-63 (1990) (reporting requirements imposed by state on religious school constitute a burden). In post-*Smith* cases involving prisoners' rights to religious freedom, the courts of appeals often have found the burdens justified, but nevertheless have recognized that a burden existed.[31] *Hunafa v. Murphy*, 907 F.2d 46 (7th Cir. 1990) (possibility that pork products on tray may "run together" with other food, thereby threatening prisoner's religiously-founded objections to eating pork, recognized as burden that may survive after *Smith*); *Salaam v. Lockhart*, 905 F.2d 1168, 1170 (8th Cir. 1990) (policy limiting name changes by prisoners admitted to infringe upon inmate's free exercise rights); *Friedman v. Arizona*, 912 F.2d 328 (9th Cir. 1990), *cert. denied sub nom. Naftel v. Arizona*, 111 S. Ct. 996 (1991) (restrictions on growing a beard).[32] *Compare Murray v. City of Austin*, U.S. App. LEXIS 26392, *14 (5th Cir. 1991) (city insignia bearing Christian cross; court rejected plaintiff's argument that insignia caused burden by "subtle coercion" to adhere to the majoritarian faith; "actual inter-

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[31] The cited cases involve application of the tests set forth in *Turner v. Safley*, 482 U.S. 78 (1987) and in *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), but were decided after *Smith*.

[32] Pre-*Smith* cases involving burdens on religious organizations analogous to the ones presented by this case, though less severe, include *Islamic Center of Mississippi, Inc. v. City of Starkville*, 840 F.2d 293 (5th Cir. 1988), and *City of Sumner v. First Baptist Church*, 97 Wash.2d 1, 639 P.2d 1358 (1982).

ference" or "actual compulsion" is necessary (citing cases)).

IV. AN OUTRAGEOUS VIOLATION OF THE ESTABLISHMENT CLAUSE SHOULD NOT BE COUNTENANCED

Respondent Vienna Board of Zoning Appeals prohibited the Fairfax Christian School from continuing to use the sanctuary at the Vienna Assembly of God Church for anything other than "musical instruments." J.A. 3829. Because of this prohibition, religious classes, Bible study, prayers and devotions could no longer be conducted by Fairfax Christian School teachers or students in front of the cross within the most sacred area of the church. Yet, other, larger groups could use that area for Bible study, religious services and entertainment—as they had for years.

No reason for this prohibition ever was given by respondents at the time. No justification was provided at trial, except for an insensitive statement by counsel for the Town respondents that the permit's ban on religious use of a church sanctuary was like saying "you can't have your classes in the bathroom and you can't have them in the closet. If you are going to run a school, then have your classes in classrooms. That's what the permit says." J.A. 2052.

This direct interference with religious speech and worship in a holy place is a violation of all three prongs of the Establishment Clause test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). No evidence whatsoever of secular purpose was offered, the clear and primary effect of this restriction was to inhibit religious practices, and such unjustified intrusion into the very heart of church and religious school affairs is the type of government entanglement against which the Establishment Clause is meant to protect.

The trial court admitted it could see no "logic" for this blatant restriction, but then declined to rule at all on petitioners' Establishment Clause claim. J.A. 2070-71.[33] The Fourth Circuit also did not address the legal and factual issues argued to it in the briefs on this Establishment Clause claim. Instead, it ritualistically stated that religious organizations are "not exempt" from "building and zoning regulations." App. at 14a. But if there was a valid zoning, health, safety, or building code interest behind this remarkable restriction, it never has been identified or proved.

CONCLUSION

The lower courts, government agencies, and individuals seeking to exercise their religious rights need clarification of this Court's decision in *Employment Division v. Smith*. This case provides the Court with that opportunity.

Respectfully submitted,

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Dated: December 12, 1991

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[33] The sanctuary restriction was specifically pled as an Establishment Clause claim. Second Amended Complaint, J.A. 1209-10.

APPENDIX

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APPENDIX

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-2406

CHRIST COLLEGE, INC.; ROBERT L. THOBURN; ROSEMARY S. THOBURN; JOHN M. THOBURN; LLOYD L. THOBURN; THOBURN LIMITED PARTNERSHIP; GLENN T. DRYDEN; JUDY K. DRYDEN; DOROTHY L. THOBURN, an infant, by Lloyd L. Thoburn, her next friend,

Plaintiffs-Appellants,

v.

BOARD OF SUPERVISORS, FAIRFAX COUNTY; THE TOWN OF VIENNA, VIRGINIA, a Municipal Corporation; VIENNA BOARD OF ZONING APPEALS; JOSEPH ALEXANDER; SHARON BULOVA; THOMAS M. DAVIS, III; KATHERINE K. HANLEY; GERALD HYLAND; HAMILTON J. LAMBERT; ELAINE MCCONNELL; AUDREY C. MOORE; MARTHA V. PENNINO; LILLA RICHARDS,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria
Claude M. Hilton, District Judge
(CA-90-1131-A)

Argued: April 8, 1991

Decided: September 13, 1991

Before PHILLIPS, WILKINSON, and HAMILTON, Circuit Judges. Affirmed by unpublished opinion. Judge Phillips wrote the opinion, in which Judge Wilkinson and Judge Hamilton joined.

COUNSEL

ARGUED: Richard J. Leighton, LEIGHTON & REGNERY, Washington, D.C., for Appellants. James Patrick Taves, Senior Assistant County Attorney, Fairfax, Virginia, for Fairfax County Appellees; Warren Hunter Britt, PARVIN, WILSON, BARNETT & HOPPER, Richmond, Virginia, for Town of Vienna Appellees.

ON BRIEF: Alfred S. Regnery, Dan M. Peterson, Susan K. Anthony, LEIGHTON & REGNERY, Washington, D.C., for Appellants. David T. Stitt, County Attorney, Mark B. Taylor, Assistant County Attorney, Fairfax, Virginia, for Fairfax County Appellees.

OPINION

PHILLIPS, Circuit Judge:

This is an appeal from a directed verdict by the District Court for the Eastern District of Virginia, dismissing the claims of the operator of a for-profit Christian school, and related parties, under 42 U.S.C. § 1983. Appellants contended, in essence, that they had been denied their constitutional rights to free exercise, equal protection, and substantive due process, as well as their right to be free of an established religion, as a result of their being denied permission to operate or build a schoolhouse at various locations in Fairfax County and the Town of Vienna, Virginia. Because we conclude that the various zoning and public health and safety policies at issue here

did not violate the constitutional rights of any of the appellants, we affirm.

I

In 1961, Robert L. Thoburn and his wife, Rosemary, started the Fairfax Christian School (FCS) in what was then the town of Fairfax. Thereafter he and his various familial associates operated the school on various properties in the Northern Virginia area. FCS was moved to Fairfax County in 1964 and was located on Popes Head Road by virtue of a special permit from the County Board of Zoning Appeals (BZA). The school later received other special permits from the BZA authorizing expansion of the FCS facility. FCS was operated at this location for twenty years, by which time enrollment exceeded 500 students. In 1984, the Thoburns sold the Popes Head site for $3 million. At the time they sold the site, the Thoburns had not made any final arrangements for relocating the school.

In February 1985, the Thoburns completed the purchase of about sixty acres of property in the Oakton area of Fairfax County. The Oakton property was zoned R-1, residential, one dwelling per acre. Although Fairfax County permits a school to operate on any property zoned for commercial or industrial use as a matter of right it requires that a school obtain a special exemption to the zoning laws before it may locate in an area zoned residential. Thoburn submitted an application for a special exemption shortly after completing the Oakton purchase, seeking permission to operate FCS on a forty acre portion of the Oakton property. The County's planning staff and the Planning Commission recommended denial of the application on several grounds, including the fact that the density of the use would violate the county's Comprehensive Plan, the application did not satisfy all applicable zoning standards, and that it proposed a major disturbance of an established Environmental Quality Corridor. Among the concerns noted was the Thoburns' plan to clear and grade large areas of the flood-

plain for the construction of ballfields. The County Board of Supervisors held a public hearing and a month later, on a 4-4 vote, rejected the application for a special exemption.

In February of 1987, Thoburn filed a second application for special exemption for the Oakton site. This new application was substantially similar to the first submission, contemplating the same ballfields across the floodplain and a similarly formidable projected school population of 576 students. Again the Fairfax County planning staff and Planning Commission recommended denial of the application. After a public hearing, the Board of Supervisors again denied the request, this time on a 5-4 vote.

In search of a temporary home for FCS after the sale of the Pope's Head property, the Thoburns leased portions of Jerusalem Baptist Church and Temple Baptist Church in Fairfax County as interim locations for the school. In early 1988, the Fairfax County Office of Assessments sent a letter to Jerusalem Baptist Church inquiring into the lease arrangements between the church and FCS.[1] After this inquiry regarding the church's tax-exempt status, Jerusalem Baptist decided not to renew its lease to FCS.

To provide another temporary home for the school, the Thoburns began renovating three houses they owned on Hunter Mill Road. This area was zoned R-E, residential estate, a designation which allows no more than one dwelling per two acres. Thoburn applied for, and received, residential building permits to perform this work. His plans, submitted for the purpose of receiving the building permits, showed bedrooms, living rooms, and other residential spaces, rather than classrooms. Thoburn admitted, however, that he never intended to use these renovated buildings for residential purposes but

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[1] Under Virginia law, tax exempt property leased for profit may not retain full tax exempt status. Va. Code § 58.1-3603.

rather intended them to function as a school facility for FCS. The modifications were performed up to the higher standards set for commercial property, however, and included installation of fire alarms, exit signs, and fire rated doors.

In late August 1988, the Fairfax County Executive learned that the Thoburns planned to open a school on the Hunter Mill Road site without obtaining a special exemption to the local zoning regulations. On September 1, 1988, the County Fire Marshal, the Building Official, and the Zoning Administrator filed suit in the county circuit court to enjoin Thoburn from opening FCS at Hunter Mill without obtaining a special exemption or in violation of the building code. After a hearing on September 13, 1988, the court enjoined the Thoburns from operating the school on the site until it received county approval. At that time, the circuit court considered free exercise and equal protection claims brought by Thoburn but concluded that no constitutional violations had occurred. Further, the court held that if the court allowed the school to operate, "the students would be placed in a hazardous situation, which would be a danger to their health, to their safety and to their welfare." The court added that the Thoburns and FCS were "responsible for creating this situation in that they have failed to comply with state and local law."

The Thoburns then decided to operate FCS in Vienna Assembly of God Church (Virginia Assembly). Virginia Assembly is located in Vienna, Virginia, which is in turn located in Fairfax County. Vienna has its own Town Council, Board of Zoning Appeals, and Zoning Ordinance. On July 20, 1988, the Town Board of Zoning Appeals approved a conditional use permit for 49 students in the Virginia Assembly basement. On September 19, 1988, the Thoburns applied for a temporary use permit for 175 more students. The next day, without having received approval of the temporary use permit application, lack-

ing occupancy approval for the initial forty nine students, and without consulting the fire marshal, the entire Fairfax Christian School was moved into the Virginia Assembly building. Two days later, a county fire technician inspected the Virginia Assembly and ordered FCS to evacuate the premises. Despite the evacuation order, FCS remained open and students continued to attend school at the Virginia Assembly site. Consequently, on September 23, the Town of Vienna sued in county circuit court to enjoin the further operation of FCS in the Virginia Assembly facility, absent necessary permits and safety approval. The school continued operation until the court finally granted an injunction against further use of the church. Two weeks later, FCS was granted temporary permission to operate at Virginia Assembly after it had substantially complied with all zoning and building code requirements. FCS received a permanent use permit for 174 students on May 17, 1989.

On December 9, 1988, the Thoburns applied for a special exemption for the Hunter Mill site. The application included a request to use the property for FCS during the day, for Christ College during evenings, and by Mrs. Thoburn for her adult literacy classes on weekends. The County planning staff recommended approval with certain conditions, and the Board of Supervisors subsequently approved the Hunter Mill special exemption on May 8, 1989 with certain limitations on the use of the property. The exemption was only approved as to FCS; the exemption did not authorize use of the site for either Christ College classes or Thoburn's adult literacy classes. In addition, the Supervisors attached certain public safety conditions to the permit which, by the fall of 1989, FCS had not yet satisfied. At the time of trial, FCS had not been able to obtain final zoning permission for the property.

The Thoburns, joined by Glenn T. and Judy K. Dryden, parents of FCS students and Christ College, as plaintiffs

then brought this action under 42 U.S.C. § 1983 against Fairfax County, the Town of Vienna, the Town Board of Zoning Appeals, and various county and Town officials alleging violations by the defendants of the plaintiffs' constitutional rights to due process, equal protection, and free exercise, as well as violations of the first amendment prohibition on the establishment of religion. After plaintiffs presented their case at trial, defendants moved for a directed verdict on all issues. The district court granted this motion and plaintiffs now appeal.

II

Appellants' first contention is that the district court erred in directing a verdict on the free exercise issue. They argue that the zoning and fire safety policies of the county and the town impinged on their first amendment rights to the free exercise of religion. Their claim is based on their reading of *Sherbert v. Verner*, 374 U.S. 398 (1963). There, the Court held that whenever a governmental action "burdens" the free exercise of religion, the action must be justified by a compelling governmental interest. *Id.* at 402-03. The decision was ground-breaking in that it recognized for the first time that a governmental action which was facially neutral, but had the effect of impairing the free practice of religion, would receive strict scrutiny. More recently, however, the Supreme Court has begun to rethink its fundamental approach to the free exercise clause.

In *Employment Division v. Smith*, 110 S. Ct. 1595 (1990), the Court held that a facially neutral criminal law which has the incidental effect of impairing free exercise of religion is not subject to *Sherbert*'s rigorous compelling interest analysis. *Id.* at 1603. The Court suggested that such scrutiny might be reserved for only those criminal regulations which implicate both free exercise and some other fundamental right, such as free speech, free press, or the right of a parent to educate his

or her child. *Id.* at 1601-02. The court did not address, however, the continued vitality of *Sherbert* in free exercise challenges which, like this one, involve non-criminal state regulation.

Appellants, perceiving that their free exercise claim might be cast into doubt by *Employment Division v. Smith*, suggest that the various actions at issue here impaired both free exercise rights and the right of the parents of FCS students to educate their children as they see fit. They therefore contend that, even if we were to expand *Employment Division*'s analysis into a non-criminal context, their claim is exactly the sort of hybrid still subject to strict scrutiny under *Employment Division*. We need not, however, decide whether appellant's claim is indeed a hybrid, under *Employment Division*, or even whether *Sherbert* remains good law with respect to neutral, non-criminal state regulations. We conclude that appellants failed to establish the first element in any free exercise claim: they have not proved that the zoning laws or fire codes burden their exercise of religion. We begin by considering their claims vis-a-vis the zoning provisions.

In analyzing appellants' critical failure of proof as to these, it may be helpful to hypothesize ways in which zoning laws might conceivably burden rights to the free exercise of religion through the operation and use of such schools as FCS. The most obvious way of course would be by absolutely preventing any property's use for such purpose. Fairfax County zoning provisions do not prohibit the operation of private, or parochial, schools by any such blunt means. The zoning provisions in fact permit such a school to be located in either commercial or industrial zones without any special exemption. In addition, with a special exemption, such schools may also be located within residential zones.

Beyond this most obvious way of burdening such rights, they might conceivably do so by preventing use of cer-

tain property having particular religious significance. Less conceivably, but possibly, they might do so by curtailing particular uses having special religious significance. But appellants have not shown that conformance to Fairfax's zoning regulations would in these or any other way impair any aspect of anyone's free exercise of religion. They have not shown how their rights may only be exercised in a facility located in a residential zone, nor that conforming to the special exemption requirements laid down by Fairfax would in any constitutionally significant way burden those rights.

Unquestionably, Fairfax's zoning laws made it more difficult for FCS to be located on property of the Thoburns' choice. The fact that local regulations limit the geographical options of a religious school, however, does not prove that any party's right to free exercise is thereby burdened. There must at least be some nexus between the government regulation—here, a zoning law—and impairment of ability to carry out a religious mission. It is not enough that an entity conducting a religious program or mission would prefer to locate on residential property. That preference must be linked to religious imperatives. No such link was proved here and the court was correct in concluding that the zoning regulations did not burden appellants' free exercise of religion.

Similarly, appellants failed to establish how conforming to local fire and safety codes could impair the religious mission of FCS. As we have noted, regulations "manifestly and properly concerned only with the health, safety, and welfare of children" cannot "be held to impinge on any currently known or practiced religious beliefs under free exercise protection." *Forest Hills Early Learning Center, Inc. v. Lukhard*, 728 F.2d 230, 244 (4th Cir. 1984). Lacking any such evidence on the record, we affirm the district court's decision rejecting appellants' free exercise claims.

III

Appellants next argue that zoning exemptions were handed out in a discriminatory fashion and that denial of theirs constituted a violation of the equal protection clause. While the equal protection clause is generally reserved for challenges to governmental policies which are discriminatory on their face, such claims may be maintained even when an action is neutral on its face if the statute was motivated, in whole or in part, by a discriminatory purpose or intent. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265-68 (1977).

One basic fact must be proved, however, to succeed in any such equal protection challenge. A plaintiff must establish that he was subjected to discriminatory treatment vis-a-vis another similarly situated party. It is this first, essential fact that appellants were never able to establish at trial, specifically that they received different, inferior treatment in their efforts to receive zoning approval than did other similarly situated private schools. As the district court pointed out, FCS was entitled to location in commercial and industrial zones as a matter of right, and each time the Thoburns complied with the building or zoning requirements in Vienna or Fairfax, they were issued a permit to operate on residential property.

Even if appellants had been able to prove some level of disparate treatment, they were unable to establish any religious animus on the part of the town or the county. Given that the laws at issue here are facially neutral, evidence of such animus would have been essential to establish an equal protection claim. The statement of County Supervisor Alexander who cast the pivotal vote in 1987, clearly suggests, however, a lack of religious animus. He stated:

> I think that the school is a good school. I think there's no question about the fact that it's a good

> Christian school and we need those in this County, without any doubt, and I'm in favor of that. . . .
>
> 'The major environmental concern related to this proposed development is the lack of protection of the environmental quality corridor of Rocky Branch . . . . This development cannot be considered to be environmentally sensitive, nor does it help preserve the ecological integrity of the Difficult Run watershed'. . . .
>
> [The Planning Commission Report] goes on to say a number of measures which would have to be taken in order to make [the FCS proposal] compatible [with the environmental concerns of the Comprehensive Plan]. None of these measures have been taken. . . .

In fact, appellants did not present any evidence at all of legislative animus toward religion or any religious group. In light of appellants' failure to establish either disparate treatment or discriminatory animus, the district court rightly ruled that their equal protection claim failed as a matter of law.

IV

Appellants next claim that the zoning process violated their substantive due process rights. We have held that "where there is fairly alleged a basis for finding either 'abuse of discretion [or] caprice in [a] zoning administrator's refusal to issue' a . . . permit, a Fourteenth Amendment claim is properly stated." *Marks v. City of Chesapeake*, 883 F.2d 308, 311 (4th Cir. 1989), quoting, *Scott v. Greenville County*, 716 F.2d 1409, 1419 (4th Cir. 1983). Further, we have noted "that government officials simply cannot act solely in 'reliance on public distaste for certain activities, instead of on legislative determinations concerning public health and safety [or otherwise] dealing with zoning.'" *Marks*, supra at 311, quoting, *Bayou Landing, Ltd. v. Watts*, 563 F.2d 1172, 1175 (5th Cir. 1977). In essence, the appellants must prove that the

town and county's land use decisions were "arbitrary and capricious." *See Scott*, supra, at 1420 n. 14.

Appellants principally rely on our decision in *Marks v. City of Chesapeake*, arguing that the various local officials here acted out of arbitrary dislike for FCS. *Marks* involved a palmist applying to obtain a conditional use permit. The city and its elected representatives initially supported allowance of the permit. Only after certain local citizens displayed overt religious hostility to the presence of the palmist did the city government shift positions, opposing the grant of a permit. In *Marks* it was easy to isolate the cause of the city's decision to deny the permit. Until the citizens bared their arbitrary religious hostility to the palmist, the city moved smoothly to approve a permit for him. After the citizens spoke out, the city moved equally quickly in rejecting the permit request.

This case is fundamentally different from *Marks*. The various special exemption applications in this case were reviewed thoroughly by the Fairfax land use experts. Both the Planning Commission and the professional planning staff continuously opposed granting the exemptions for the proposed uses suggested by the Thoburns. The Planning Commission offered legitimate land use explanations for their decisions: protecting environmental quality, controlling storm water runoff, maintaining population density, protecting the comprehensive plan, and preventing development so intense that it was inconsistent with the development of the adjoining area. Reviewing the transcript of the Planning Commission meeting, it is clear that the only considerations discussed were legitimate land use issues. Religion was not discussed. Similarly, the discussion at the 1987 Board of Supervisors meeting, in which the Board voted 5-4 to reject the proposal, indicates no religious animus. Supervisor Hanley explained:

> The issues before us are land use issues, not religious church related issues, not political issues. This issue before us is not are schools allowed in residential areas, it is rather is this proposal appropriate in this location. . . .
>
> I cannot in good conscience recommend that the Board allow by its discretion trough the purposeful granting use of a special exception something that we know is in violation of the master plan, that we know will do environmental damage and could set a precedent in a residential area.
>
> This is an area where the plan recommends lower density than even the zoning allows.

Likewise, the comments of Supervisor Alexander, infra at 9, indicate that the council acted on the basis of legitimate land use considerations, not on the basis of whim, arbitrary desires, or caprice.

Based on the record at trial, therefore, appellants did not prove that their applications were denied arbitrarily or capriciously. Similarly, Vienna's actions with respect to Virginia Assembly were based on rational health and safety concerns.[2] Lacking evidence that plaintiffs' substantive due process rights had been violated, the court correctly granted a directed verdict on this claim.

V

Appellants next claim that the various zoning and safety regulations violate the establishment clause because they require excessive entanglement between church and state. In dismissing all of the appellants' claims the district court did not explicitly address the establishment clause issue. Given that the court plainly granted a directed verdict with respect to all of appellant's claims, this issue is appropriately before us.

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[2] We also note that Vienna's decisions to enforce the safety codes at Virginia Assembly were ratified by a circuit court judge.

The Supreme Court has addressed explicitly the issue whether and how zoning and fire and safety regulations may violate the first amendment's establishment clause. As the Court stated in *Tony and Susan Alamo Foundation v. Secretary of Labor*, "the Establishment Clause does not exempt religious organizations from such secular governmental activity as fire inspections and building and zoning regulations." 471 U.S. 290, 305 (1985); *see also First Assembly of God v. City of Alexandria*, 739 F.2d 942, 944 (4th Cir. 1984). The Establishment Clause simply does not restrict either Fairfax or Vienna from making land use decisions, and we affirm on this issue as well.

VI

Appellants next argue that the trial court abused its discretion by excluding relevant evidence at trial. First, they contend that the court erred in keeping out evidence comparing the siting of public schools and other governmental buildings to Fairfax County's decision rejecting the Thoburns' various special exemption applications. The court found that since the government buildings—including the public school—served different uses and were sited pursuant to different processes than FCS, the comparison was of no relevance. The court was correct in this assessment.

First, any public facility is required by law to be in substantial compliance with the Comprehensive Plan. If conformity is lacking, the Board of Supervisors must amend the Plan, following public hearings and recommendation from the Planning Commission. Second, the Board of Supervisors and Planning Commission must advertise, conduct public hearings, and approve any public facility to be added to the County's Comprehensive Plan. Notably, unlike the two buildings appellants consider most relevant to their own claims—the Government Center and Pender/Franklin Elementary School—did not conform to the Comprehensive Plan.

In addition, FCS serves a very different purpose from these government buildings. The differences between FCS and the Fairfax County Government Center are evident. FCS is also not comparable to a public elementary school. A public school must serve all children in a given geographical region. It must be located in areas reflecting the concern of geographical proximity. In addition, the Pender/Franklin Elementary site contained was not located on a floodplain or an environmental quality corridor—both significant difficulties in the FCS Oakton site. The court did not abuse its discretion in excluding evidence relating to these properties.

Appellants next complain about the exclusion of evidence relating to the land use applications of other private schools. First, they argue that evidence relating to the zoning violations of Sunrise Country Day School (SCDS) should have been admitted. SCDS is located near the proposed FCS site at Hunter Mill Road. It was found in violation of its zoning permit during the same year that Fairfax County filed suit against the Thoburns to preclude their opening of school. No suit was filed against SCDS. The district court noted that, as an operational school, SCDS was allowed time to correct zoning violations of its already approved use permit. The court found that FCS was fundamentally different in this respect, in that FCS sought to begin operation in violation of zoning regulations. This distinction was a reasonable one. The court did not abuse its discretion in excluding evidence regarding the SCDS property.

Appellants argue that evidence regarding the county's decision to provide special exemptions for Flint Hill Preparatory School and Potomac School, two other private schools, ought to have been admitted. After *voir dire*, the court found that these properties were not similarly situated with the Oakton property. With respect to Flint Hill, the court found that unlike the Oakton Property, Flint Hill (1) does not contain a floodplain; (2) is located

adjacent to commercial, industrial, and high-density residential zones; (3) is on a site planned for greater development density and (4) fronts on roads with greater traffic than the roads near the Oakton property. Similarly, the court found that unlike FCS, Potomac School: (1) was established prior to the special exemption requirements of the Zoning Ordinance; (2) did not seek permission to build ballfields in the floodplain; (3) received a special exemption conditional on the school's granting of a conservation easement; and (4) is surrounded by properties with up to six times the density of the area surrounding the Oakton property.

FCS is dissimilar from these other schools in critical respects rightly relied upon by the district court. The court did not err, therefore, in precluding evidence of the treatment accorded differently situated properties.

Appellants next argue that the court erred when it excluded the testimony of county policymakers for the purpose of determining their state of mind when they voted to deny FCS a special exemption. This claim reflects a bald reversal of strategy for appellants. Arguing for admission of this evidence below, they contended that it was necessary to show that the legislators utterly failed to take religion into account when they voted to deny the special exemption. This testimony, appellants argued, would prove their contention that, by failing to consider religious concerns in any way, the supervisors' decision to deny the special exemption did not represent the least religiously intrusive alternative and was thus in contravention of the free exercise clause. The court was disinclined to allow legislators to testify with respect to legislative intent, but the defendants stipulated to the fact that the legislators did not take religion into consideration at the time of their votes. Appellants now take a different tack, contending on appeal that this testimony should have been allowed for the purpose of proving that the legis-

lators did, in fact, take religion into account. The district court obviously did not err in declining to admit this testimony under the circumstances of its proffer at trial. Just as obviously, appellants cannot be allowed to challenge that ruling on appeal on a diametrically opposed position to the only one taken in the district court.

Appellants argue that the court erred by excluding evidence of what is known as the "Carl Sell" incident. They proffered that an eye-witness would testify that Carl Sell, Planning Commissioner for Supervisor Joseph Alexander, offered to deliver Alexander's vote in favor of a special exemption for FCS if Thoburn would, in exchange, withdraw his candidacy for county supervisor. At the time of the 1987 vote, Thoburn was running for the Republican nomination for supervisor against Nancy Falck. Shortly after this alleged discussion, Alexander cast the fifth and decisive vote denying FCS a special exemption for the Oakton property. The court excluded this evidence concluding, among other reasons, that the marginal probative value of such testimony with respect to appellants' claims would be significantly outweighed by the substantial prejudicial effect of such testimony. The court's assessment of this proffer of evidence under Rule 403 of the Federal Rules of Evidence did not constitute an abuse of discretion.

Appellants contend that the court erred by excluding evidence relating to damages and burden on religion. They sought to introduce newspaper articles, tax forms, and enrollment data to show that the zoning decisions caused bad press, steep decreases in enrollment, and a substantial decline in revenue for the school. The court justifiably excluded evidence of enrollment and income declines because it was not produced to the defendants in a timely fashion. It correctly excluded the newpaper articles as cumulative and repetitive since other witnesses testified to the same effect as the articles. These rulings did not constitute any abuse of discretion.

Appellants contend that the court erred by excluding the testimony of all their proffered experts but one. The court repeatedly requested appellants to provide the names of the experts to be used at trial, as well as interrogatory answers relating to the scope of their testimony. Appellants did not comply with the court's rulings in a timely fashion. The court therefore acted within its discretion in limiting them to only one expert. Indeed, appellants do not indicate how these experts would have made a difference to their case. The district court did not abuse its discretion in limiting appellants' proffer of expert witness testimony.

Appellants contend that the district court erred in failing to grant a new or amended scheduling order, and that the court erred in prohibiting them from deposing the county and town attorneys and in excluding their testimony at trial. Both of these orders were entered by magistrates. In both cases, FCS failed to file any objections to these orders as required by 28 U.S.C. § 636 (b)(1). The objections were therefore waived. *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984).

Appellants argue that the court erred in failing to compel defendants to make discovery. In response to voluminous discovery requests, the defendants produced a substantial quantity of documents. Thoburn, for instance, obtained over 22,000 copies of documents from the files of Fairfax County alone. Indeed, the appellants received sufficient discovery to list approximately 1400 trial exhibits. Appellants, meanwhile, failed to proceed with discovery in a timely manner. A magistrate requested that the appellants narrow the scope of their discovery requests, but they did not do so until after the discovery period had concluded. Because the appellants received substantial discovery, and because their failure to obtain additional discovery was substantially their own responsibility, we affirm the district court's denial of their motion to compel further discovery.

Finally, appellants argue that Christ College was wrongfully dismissed as a plaintiff for lack of standing. The Thoburns had agreed to permit Christ College to conduct evening classes at the Hunter Mill Road site after that campus opened. The court found that Christ College had no lease agreement with FCS and had suffered no injury or threatened injury. We agree with the district court's conclusion that the amended complaint failed to state any injury suffered by Christ College.

AFFIRMED

Filed: October 28, 1991

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-2406
(CA-90-1131-A)

CHRIST COLLEGE, INC., *et al*,
Plaintiffs-Appellants,

versus

BOARD OF SUPERVISORS, FAIRFAX COUNTY, *et al*,
Defendants-Appellees.

ORDER

The Court amends its opinion filed September 13, 1991, as follows:

On the cover sheet, section 2, line 8—the name "J. Hamilton Lambert" is corrected to read "*Hamilton J.* Lambert."

On page 6, first full paragraph, line 2—commas are added after the word "students" and the word "plaintiffs."

On page 7, first full paragraph, lines 8-9; and on page 12, first full paragraph, line 6—the word "appellant's" is corrected to read "appellants'."

On page 11, line 2 of the second paragraph of the indented quotation—the word "trough" is corrected to read "t*h*rough."

On page 11, first paragraph, line 2 after the indented quotation—the word "council" is corrected to read "board."

On page 13, first paragraph, line 2—the words "the Thoburns' proposed uses" are added after the dash and before the words "did not conform."

On page 13, first full paragraph, line 7—the word "contained" is deleted and the word "on" is corrected to read "*i*n."

Throughout the opinion, the term "special exemption" is corrected to read "special *exception.*"

For the Court—
By Direction

/s/ John M. Greacen
Clerk

Filed: October 31, 1991

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-2406
(CA-90-1131-A)

CHRIST COLLEGE, *et al*,
Plaintiffs-Appellants,

versus

BOARD OF SUPERVISORS, *et al*,
Defendants-Appellees.

ORDER

The Court further amends its opinion filed September 13, 1991, and amended October 28, 1991, as follows:

On the cover sheet, section 2, line 8—the appellee's name is *J. Hamilton Lambert*.

For the Court—
By Direction

/s/ John M. Greacen
Clerk

Filed: November 21, 1991

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-2406
(CA-89-1131-A)

CHRIST COLLEGE, *et al*,
Plaintiffs-Appellants,

versus

BOARD OF SUPERVISORS OF FAIRFAX COUNTY, *etc.*, *et al.*,
Defendants-Appellees.

ORDER

The Court further amends its opinion filed September 13 and amended October 28 and October 31, 1991, as follows:

On the cover sheet, section 3, line 4—the district court number is corrected to read "CA-*89*-1131-A."

For the Court—
By Direction

/s/ John M. Greacen
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

Civil Action No. 89-1131-A

CHRIST COLLEGE, INC., *et al.*,
Plaintiffs,

v.

THE BOARD OF SUPERVISORS OF
FAIRFAX COUNTY, VIRGINIA, *et al.*,
Defendants.

ORDER

This matter came before the court on defendants, The Town of Vienna and Vienna Board of Zoning Appeals' Motion To Dismiss and defendants, Board of Supervisors of Fairfax County, the individual Board members, and the County Executive's Motion to Dismiss.

As to the issue of standing, the Court finds that plaintiffs Robert Thoburn, Rosemary Thoburn, John Thoburn, Lloyd Thoburn, Dorothy Thoburn, and the Thoburn Limited Partnership, have adequately alleged a threatened injury resulting from the defendants' conduct. As parents, plaintiffs Glenn and Judy Dryden have suffered a threatened injury insofar as their right to have their child attend a school compatible with their religious beliefs has been threatened. However, Christ College has no lease agreement with Fairfax Christian School, has suffered no injury or threatened injury and lacks the requisites for standing in this particular case. And for reasons stated from the bench, it is hereby;

ORDERED, that the motions to dismiss as to the standing of the plaintiffs is GRANTED with respect to Christ College and DENIED with respect to all other plaintiffs, and all other Motions To Dismiss are denied.

It is FURTHER ORDERED, that the defendants shall file an Answer to the Amended Complaint within ten (10) days.

Claude M. Hilton
United States District Judge

Alexandria, Virginia
October 23, 1989

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

C.A. 89-1131-A

ROBERT L. THOBURN, *et al.*,
Plaintiffs,

-vs-

THE BOARD OF SUPERVISORS OF
FAIRFAX COUNTY, VIRGINIA, *et al.*,
Defendants.

PARTIAL TRANSCRIPT

(Motion for Directed Verdict & Court's Rulings)

May 9, 1990

Before: Claude M. Hilton, Judge

And a Jury

APPEARANCES:

Richard J. Leighton, Dan M. Peterson and Alfred S. Regnery, Counsel for the Plaintiffs

J. Patrick Taves, Mark B. Taylor, Jill Rowe and Mark Sullivan, Counsel for the Fairfax Defendants

Warren R. Britt and John Gionfriddo, Counsel for the Vienna Defendants

* * * *

[22] THE COURT: In listening to the evidence that has come on here, there is no question that the plaintiffs'

evidence shows that the Thoburns have successfully operated a private Christian school, the Fairfax Christian School, in Fairfax for a long period of time. They have had in excess of 500 students. And in the process have managed to accumulate some land and done well in connection with doing that.

There isn't any question that their evidence shows that the Thoburns and the people involved in this school are dedicated Christian people, and they are dedicated to providing a school for Christian education and have done so.

There isn't any question that they have shown that they have had some difficulty with these school sites after the sale of their Pope's Head Road property.

However, their evidence does show, and I find that there is really no conflict in the evidence that has been [23] presented here, taking their evidence at best, they have shown that the difficulties that they have had were of their own making and choosing. They did decide to sell the Pope's Head Road property. And then while in some temporary facility looked to the Oakton property. They presented two requests for a special exception to that property. On both occasions they were denied. And in those occasions their special exception was not recommended by the staff nor the Planning Commission based on issues of traffic, and not fitting the master plan, and environment, and matters of density.

That they then turned to the Hunter Mill Road site and started renovations there on residential property, which they had every right to do. And certainly when you say that Mr. Lambert testified that they had done nothing wrong up to that point, that is exactly right. They had every right to do it. But what they couldn't do was move in without having the special exception for that property. They had to have the zoning required to move in on that piece of property.

There is then a problem with Vienna, where in the church in Vienna a permit was obtained for some 49 students to move in for a kindergarten. And thereafter,

without any consultation with the fire inspector, they moved a substantially higher number of students into that facility without the permit to do so. And, of course, that follows with an eviction because of the lack of the proper permits to move [24] in.

Now, the zoning regulations and the health and safety regulations involved in each of these situations are perfectly reasonable regulations. And I have heard no evidence, there isn't any evidence here that any of these regulations are unreasonable. I guess it is somehow argued that because they were not given an exception to the regulations, that that was somehow unreasonable. That jump is difficult to make.

I also don't find any evidence in this case that any of these regulations themselves has either attacked or affected the appellants, or these people's religious beliefs, the plaintiffs' religious beliefs or have sought to regulate their religious beliefs or their conduct. We haven't gone through a full range of testimony of the areas in which private schools can be placed in Fairfax County, but we certainly have evidence that they can be placed in commercial districts as a matter of right, and that they can be placed in residential areas by special exception. And indeed, the evidence in this case is that once the requirements were satisfied in Vienna, the occupancy permit was issued. And that once the procedures were followed on the Hunter Mill Road site, that approval was given.

There is no evidence that any of the actions that were taken in regard to this mention of animosity were directed toward any religious beliefs of the plaintiffs. The only comment that was made was that one of the supervisors had a [25] problem with Mr. Thoburn's politics. And I guess it was Mr. Robert Thoburn, I am not sure which one exactly the comment was directed at.

So, I find on the basis of the evidence that was presented here, there isn't either any regulation, any ordinance, any law of the County that affects the free exer-

cise laws or the equal protection clause or the due process clause. Certainly there has been plenty of testimony as to the due process involved in all of these hearings that were had in regard to the property.

In addition, these questions were in large measure litigated before the Circuit Court in Fairfax County, not in their entirety. The issues in this case went broader than the issues before the Circuit Court of Fairfax County, but they found there also to be no violations, and as did the Supreme Court of Virginia.

As to the Town of Vienna. There is no evidence of any policy practice. The testimony is clear that the issuance of the eviction order was a reasonable one. There is no evidence of any conspiracy in this case at all.

The only aspect of this case that causes me some difficulty, I have in my own mind the question of the reasonableness of saying you can't use the church sanctuary for a classroom. But I don't know that I get myself in the position of thinking about that or letting that even go forward [26] as to an issue to be resolved, because the testimony in this case is clear that that has not inhibited in any way the free exercise of these people to operate their school, which is in a temporary facility there and they are there on a temporary basis, has not prevented them from the free exercise of their religious teaching in that school and to carry on their classes. The testimony is that they teach the Bible, have devotions and carry on the same curriculum that they have before.

So, the evidence is that while that may seem to me to be something that you might as well use the sanctuary as well as any other classroom, I am not sure I see the logic for not doing it, but to say that that has denied them the right to free exercise, the evidence is to the contrary.

And for those reasons I am going to grant a directed verdict as to all defendants in this case. And this case will be dismissed.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

Civil Action No. 89-1131-A

ROBERT L. THOBURN, *et al.*,
Plaintiffs,

v.

THE BOARD OF SUPERVISORS OF
FAIRFAX COUNTY, VIRGINIA *et al.*,
Defendants.

ORDER

This matter came before the court for trial on May 7, 1990, and upon the defendants' motion for a directed verdict. For reasons stated from the bench, it is hereby

ORDERED that the defendants' motion for a directed verdict is GRANTED, and judgment is entered in favor of the defendants.

Claude M. Hilton
United States District Judge

Alexandria, Virginia
June 15, 1990

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

U.S. Const. Amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. Amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Va. Code Ann. § 15.1-490 (1989)

Matters to be considered in drawing and applying zoning ordinance and districts.—Zoning ordinances and districts shall be drawn and applied with reasonable consideration for the existing use and character of property, the comprehensive plan, the suitability of property for various uses, the trends of growth or change, the current and future requirements of the community as to land for various purposes as determined by population and economic studies and other studies, the transportation requirements of the community, the requirements for airports, housing, schools, parks, playgrounds, recreation areas and other public services, the conservation of natural resources, the preservation of flood plains, the preservation of agricultural and forestal land, the conservation of properties and their values and the encouragement of the most appropriate use of land throughout the county or municipality. (Code 1950, § 15-821; Code 1950, § 15-968.4; 1962, c. 407; 1966, c. 344; 1974, c. 526; 1978, c. 279; 1981, c. 418; 1983, c. 530; 1989, cc. 447, 449.)

Va. Code Ann. § 22.1-254 (Supp. 1991)

Ages of children required to attend.—A. Every parent, guardian, or other person in the Commonwealth having control or charge of any child who will have reached the fifth birthday on or before September 30 of any school year and who has not passed the eighteenth birthday shall, during the period of each year the public schools are in session and for the same number of days and hours per day as the public schools, send such child to a public school or to a private, denominational or parochial school or have such child taught by a tutor or teacher of qualifications prescribed by the Board of Education and approved by the division superintendent or provide for home instruction of such child as described in § 22.1-254.1.

As prescribed in the regulations of the Board of Education, the requirements of this section may also be satis-

fied by sending a child to an alternative program of study or work/study offered by a public, private, denominational or parochial school or by a public or private degree granting institution of higher education.

B. Instruction in the home of a child or children by the parent, guardian or other person having control or charge of such child or children shall not be classified or defined as a private, denominational or parochial school.

C. The requirements of this section shall not apply to any child who has obtained a high school diploma, its equivalent, or a certificate of completion, or has otherwise complied with compulsory school attendance requirements as set forth in this article.

D. The requirements of this section shall apply to any child in the custody of the Department of Youth and Family Services, or any child who may have been adjudicated as an adult, and who has not passed his eighteenth birthday. (Code 1950, § 22-275.1; 1952, c. 279; 1959, Ex. Sess., c. 72; 1968, c. 178; 1974, c. 199; 1976, cc. 681, 713; 1978, c. 518; 1980, c. 559; 1984, c. 436; 1989, c. 515; 1990, c. 797; 1991, c. 295.)

Va. Code Ann. § 22.1-254.1 (Supp. 1991)

Declaration of policy; requirements for home instruction of children.—A. When the requirements of this section have been satisfied, instruction of children by their parents in their home is an acceptable alternative form of education under the policy of the Commonwealth of Virginia. Any parent of any child who will have reached the fifth birthday on or before September 30 of any school year and who has not passed the eighteenth birthday may elect to provide home instruction in lieu of school attendance if he (i) holds a baccalaureate degree in any subject from an accredited institution of higher education; or (ii) is a teacher of qualifications prescribed by the Board of Education; or (iii) has enrolled the child or children in a correspondence course approved

by the Board of Education; or (iv) provides a program of study or curriculum which, in the judgment of the division superintendent, includes the standards of learning objectives adopted by the Board of Education for language arts and mathematics and provides evidence that the parent is able to provide an adequate education for the child.

B. Any parent who elects to provide home instruction in lieu of school attendance shall annually notify the division superintendent in August of his intention to so instruct the child and provide a description of the curriculum to be followed for the coming year and evidence of having met one of the criteria for providing home instruction as required by subsection A of this section. Any parent who moves into a school division after the school year has begun shall notify the division superintendent of his intention to provide home instruction as soon as practicable and shall comply with the requirements of this section within thirty days of such notice. The division superintendent shall notify the Superintendent of Public Instruction of the number of students in the school division receiving home instruction.

C. The parent who elects to provide home instruction shall provide the division superintendent by August 1 following the school year in which the child has received home instruction with either (i) evidence that the child has attained a composite score above the fortieth percentile on a battery of achievement tests which have been approved by the Board of Education for use in the public schools or (ii) an evaluation or assessment which in the judgment of the division superintendent, indicates that the child is achieving an adequate level of educational growth and progress.

In the event that evidence of progress as required in this subsection is not provided by the parent, home instruction shall cease and the parent shall make other

arrangements for the education of the child which comply with § 22 1-254.

D. For purposes of this section, "parent" means the biological parent or adoptive parent, guardian or other person having control or charge of a child.

Nothing in this section shall prohibit a pupil and his parents from obtaining an excuse from school attendance by reason of bona fide religious training or belief pursuant to § 22.1-257.

E. Any party aggrieved by a decision of the division superintendent may appeal his decision within thirty days to an independent hearing officer. The independent hearing officer shall be chosen from the list maintained by the Executive Secretary of the Supreme Court for hearing appeals of the placements of handicapped children. The costs of the hearing shall be apportioned among the parties by the hearing officer in a manner consistent with his findings. (1984, c. 436; 1986, c. 215; 1991, c. 306.)

Va. Code Ann. § 22.1-254.2 (Supp. 1991)

Eligibility of certain children to earn a high school equivalency certificate.—The Board of Education may establish a program of testing for general educational development through which children fifteen years of age or older who have been instructed by their parents in their home pursuant to § 22.1-254.1 for three consecutive years and who have completed such home school instruction or who have been excused from school attendance pursuant to subdivision A 2 of § 22.1-257 may earn a high school equivalency certificate. (1989, c. 225.)

Va. Code Ann. § 22.1-255 (1985)

Nonresident children.—Any person who has residing with him for a period of sixty days or more any child within the ages prescribed in § 22.1-254 whose parents or guardians reside in another state or the District of

Columbia shall be subject to the provisions of § 22.1-254 and shall pay or cause to be paid any tuition charges for such child that may be required pursuant to § 22.1-5 or shall return such child to the home of his parents or legal guardians. (Code 1950, § 22-220; 1958, c. 628; 1968, c. 178; 1976, cc. 681, 713; 1978, c. 140; 1980, c. 559.)

Va. Code Ann. § 256 (1985)

Children exempted from article.—A. The provisions of this article shall not apply to:

1. Children suffering from contagious or infectious diseases while suffering from such diseases;

1a. Children whose immunizations against communicable diseases have not been completed as provided in § 22.1-271.2;

2. Children under ten years of age who live more than two miles from a public school unless public transportation is provided within one mile of the place where such children live;

3. Children between ten and seventeen years of age who live more than 2½ miles from a public school unless public transportation is provided within 1½ miles of the place where such children live;

4. Children excused under § 22.1-257 of this article;

5. Any child who will not have reached his sixth birthday on or before September 30 of each school year whose parent or guardian notifies the appropriate school board that he does not wish the child to attend school until the following year;

6. Any child withdrawn from kindergarten as provided in § 22.1-3 until the school year following the withdrawal.

B. The distances specified in paragraphs A 2 and A 3 of this section shall be measured or determined from

the entrance to the school grounds or the school bus stop nearest the entrance to the residence of such children by the nearest practical routes which are usable for walking or riding. Disease shall be established by the certificate of a reputable practicing physician in accordance with regulations adopted by the Board of Education. (Code 1950, § 22-275.3; 1959, Ex. Sess., c. 72; 1968, c. 178; 1975, c. 558; 1976, cc. 681, 713; 1978, c. 518; 1980, c. 559; 1981, c. 540; 1985, c. 407.)

Va. Code Ann. § 22.1-257 (Supp. 1991)

Excusing children who cannot benefit from education or whose parents conscientiously object; excusing children for reasons of health or apprehension for personal safety; court authority to order alternatives.—A. A school board:

1. May, on recommendation of the principal and the division superintendent, with the written consent of the parent or guardian, excuse from attendance at school any pupil who the school board determines, in accordance with regulations of the Board of Education, cannot benefit from education at such school;

2. Shall excuse from attendance at school any pupil who, together with his parents, by reason of bona fide religious training or belief, is conscientiously opposed to attendance at school;

3. Shall, on the recommendation of the juvenile and domestic relations district court of the county or city in which the pupil resides, excuse from attendance at school for such period of time as the court deems appropriate any pupil who, together with his parents, is opposed to attendance at a school by reason of concern for such pupil's health, as verified by competent medical evidence, or by reason of such pupil's reasonable apprehension for personal safety when such concern or apprehension in that pupil's specific case is determined by the court to be justified;

4. May, on recommendation of the juvenile and domestic relations district court of the county or city in which the pupil resides, excuse from attendance at school any pupil who, in the judgment of such court, cannot benefit from education at such school.

B. The court in reaching its determination as to whether the concern or apprehension referred to in subdivision A 3 of this section is justified shall take into consideration the recommendation of the principal and division superintendent.

C. The juvenile and domestic relations district court of the county or city, in which a pupil resides or in which charges are pending against a pupil, may require the pupil who has been charged with (i) a crime which resulted in or could have resulted in injury to others, (ii) a violation of Article 1 (§ 182.2-77 et seq.) of Chapter 5 of Title 18.2, or (iii) any offense related to possession or distribution of any Schedule I, II, or III controlled substances to attend an alternative education program, including, but not limited to, night school, adult education, or any other educational program designed to offer instruction to students for whom the regular program of instruction may be inappropriate.

D. As used in subdivision A 2 of this section, the term "bona fide religious training or belief" does not include essentially political, sociological or philosophical views or a merely personal moral code. (Code 1950, §§ 22-275.4, 22-275.4:1; 1954, c. 638; 1959, Ex. Sess., c. 72; 1968, c. 178; 1970, cc. 162, 451; 1976, c. 692; 1980, c. 559; 1991, c. 606.)

Va. Code Ann. § 22.1-258 (Supp. 1991)

Appointment of attendance officers; notification when pupil fails to report to school.—Every school board shall have power to appoint one or more attendance officers who shall be charged with the enforcement of the pro-

visions of this article. Where no attendance officer is appointed by the school board, the division superintendent shall act as attendance officer.

Whenever any pupil fails to report to school on a regularly scheduled school day and no indication has been received by school personnel that the pupil's parent or guardian is aware of the pupil's absence, a reasonable effort to notify by telephone the parent or guardian shall be made by the attendance officer, other school personnel or volunteers organized by the school administration for this purpose. School divisions are encouraged to use non-instructional personnel for this notice.

Whenever any pupil fails to report to school for five consecutive school days, and no indication has been received by school personnel that the pupil's parent or guardian is aware of the pupil's absence, and a reasonable effort to notify the parent or guardian has failed, the school principal or his designee shall notify the parent or guardian by letter that such parent or guardian is requested to advise the school in writing of the reason for the pupil's absence or to accompany the pupil upon his return to school to explain the reason for his absence. Upon the failure of the parent or guardian to so advise the school or to return the child to school within three days of the date of the notice, the school principal or his designee shall notify the attendance officer or the division superintendent, as the case may be, who shall enforce the provisions of this article.

However, nothing in this section shall be construed to limit in any way the authority of any attendance officer or division superintendent to seek immediate compliance with the compulsory school attendance law as set forth in this article.

Attendance officers, other school personnel or volunteers organized by the school administration for this purpose shall be immune from any civil or criminal liability in

connection with the notice to parents of a pupil's absence or failure to give such notice as required by this section. (Code 1950, § 22-275.16; 1959, Ex. Sess., c. 72; 1980, c. 559; 1985, c. 482; 1990, c. 797; 1991, c. 295.)

Va. Code Ann. § 22.1-259 (1985)

Teachers to keep daily attendance records.—Every teacher in every school in the Commonwealth shall keep an accurate daily record of attendance of all children in accordance with regulations prescribed by the Board of Education. Such record shall, at all times, be open to any officer authorized to enforce the provisions of this article who may inspect or copy the same and shall be admissible in evidence in any prosecution for a violation of this article as prima facie evidence of the facts stated therein. (Code 1950, §§ 22-209, 22-275.15; 1959, Ex. Sess., c. 72; 1964, c. 119; 1968, c. 178; 1980, c. 559.)

Va. Code Ann. § 22.1-260 (Supp. 1991)

Report of children enrolled and not enrolled.—A. Within ten days after the opening of the school, each public school principal shall report to the division superintendent:

1. The name, age and grade of each pupil enrolled in the school, and the name and address of the pupil's parent or guardian; and

2. To the best of the principal's information, the name of each child subject to the provisions of this article who is not enrolled in school with the name and address of the child's parent or guardian.

B. For the purposes of this section, each student shall present a federal social security number within ninety days of his enrollment. The Board of Education shall, after consulting with the Social Security Administration, promulgate guidelines for determining which individuals are eligible to obtain social security numbers. In any case

in which an individual is ineligible, pursuant to these guidelines, to obtain a social security number, the superintendent or his designee may waive this requirement. (Code 1950, §§ 22-275.8, 22-275.9; 1959, Ex. Sess., c. 72; 1980, c. 559; 1987, c. 374; 1988, c. 163.)

Va. Code Ann. § 22.1-261 (1985)

Division superintendent to make list of children not enrolled; duties of attendance officer.—The division superintendent shall check the reports submitted pursuant to § 22.1-260 with the last school census and with reports from the State Registrar of Vital Records and Health Statistics. From these reports and from any other reliable source the division superintendent shall, within five days after receiving all reports submitted pursuant to § 22.1-260, make a list of the names of children who are not enrolled in any school and who are not exempt from school attendance. It shall be the duty of the attendance officer to investigate all cases of nonenrollment and, when no valid reason is found therefor, to notify the parent, guardian or other person having control of the child to require the attendance of such child at the school within three days from the date of such notice. (Code 1950, § 22-275.10; 1959, Ex. Sess., c. 72; 1980, c. 559.)

Va. Code Ann. § 22.1-262 (Supp. 1991)

Complaint to court when parent fails to comply with law.—A list of persons so notified shall be sent by the attendance officer to the appropriate school principal. If the parent, guardian, or other person having control of the child fails to comply with the law within the time specified in the notice, it shall be the duty of the attendance officer to make complaint in the name of the Commonwealth before the juvenile and domestic relations district court. In addition thereto, such child may be proceeded against as a child in need of services or a child in need of supervision as provided in Chapter 11 (§ 16.1-

226 et seq.) of Title 16.1. (Code 1950, § 22-275.11; 1959, Ex. Sess., c. 72; 1976, c. 98; 1980, c. 559; 1990, c. 797; 1991, c. 295.)

Va. Code Ann. § 22.1-263 (Supp. 1991)

Violation constitutes misdemeanor.—Any person violating the provisions of either §§ 22.1-254, 22.1-255, or § 22.1-267 shall be guilty of a Class 4 misdemeanor. (Code 1950, § 22-275.5; 1959, Ex. Sess., c. 72; 1976, c. 283; 1980, c. 559; 1990, c. 797, 1991, c. 295.)

Va. Code Ann. § 22.1-264 (1985)

Misdemeanor to make false statements as to age.—Any person who makes a false statement concerning the age of a child between the ages set forth in § 22.1-254 for the purpose of evading the provisions of this article shall be guilty of a Class 4 misdemeanor. (Code 1950, § 22-275.18; 1959, Ex. Sess., c. 72; 1968, c. 178; 1976, cc. 283, 681, 713; 1980, c. 559.)

Va. Code Ann. § 22.1-265 (Supp. 1991)

Inducing children to absent themselves.—Any person who induces or attempts to induce any child to be absent unlawfully from school or who knowingly employs or harbors, while school is in session, any child absent unlawfully shall be guilty of a Class 4 misdemeanor and may be subject to the penalties provided by subdivision 5 a of subsection B of § 16.1-278.5 or § 18.2-371. (Code 1950, § 22-275.19; 1959, Ex. Sess., c. 72; 1976, c. 283; 1980, c. 559; 1990, c. 797; 1991, cc. 295, 534.)

Va. Code Ann. § 22.1-266 (1985)

Law-enforcement officers and truant children.—Notwithstanding the provisions of §16.1-246 of this Code, any law-enforcement officer as defined in § 9-169 of this Code or any attendance officer may pick up any child who is reported to be truant from school by a school principal or

division superintendent or who the law-enforcement officer or attendance officer reasonably determines, by reason of the child's age and circumstances, is truant from school and may deliver such child to the appropriate school and personnel thereof without charging the parent or guardian of such child with a violation of any provision of law. (Code 1950, § 22-275.11:1; 1976, c. 692; 1978, c. 215; 1980, c. 559.)

Va. Code Ann. § 27-101 (Supp. 1991)

Injunction upon application.—Every court having jurisdiction under existing or any future law is empowered to and shall, upon the application of the local enforcing agency or State Fire Marshal, issue either a mandatory or restraining injunction in aid of the enforcement of, or in prevention of the violation of, any of the provisions of this law or any valid rule or regulation made in pursuance thereof. The procedure for obtaining any such injunction shall be in accordance with the laws then current governing injunctions generally except that the enforcing agency shall not be required to give bond as a condition precedent to obtaining an injunction. (1986, c. 429.)

Va. Code Ann. § 58.1-3603 (1991)

Exemptions not applicable when building is source of revenue.—A. Whenever any building or land, or part thereof, exempt from taxation pursuant to this chapter and not belonging to the Commonwealth is leased or is otherwise a source of revenue or profit, all of such buildings and land shall be liable to taxation as other land and buildings in the same county, city or town. When a part but not all of any such building or land, however, is leased or otherwise is a source of revenue or profit, and the remainder of such building or land is used by any organization exempted from taxation pursuant to this chapter for its purposes, only such portion as is so leased or is otherwise a source of profit or revenue shall be liable for taxation.

B. In assessing any building and the land it occupies pursuant to subsection A, the assessing officer shall only assess for taxation that portion of the property subject to any such lease or otherwise a source of profit or revenue and the tax shall be computed on the basis of the ratio of the space subject to any such lease or otherwise a source of profit or revenue to the entire property. When any such property is leased for portions of a year the tax shall be computed on the basis of the average use of such property for the preceding year. (Code 1950, §§ 58-14, 58-16; 1950, p. 659; 1984, c. 675.)

Vienna, Va., Town Code § 7-14 (1988)

Office Created; Appointment; Powers and Duties Generally; Compensation.

The office of the Town Fire Marshal is hereby created. The Town Council shall appoint a Fire Marshal whose powers and duties shall be set forth in this Chapter. He shall receive such annual salary as the Town Council may allow. Until such time as a Fire Marshal is appointed hereunder, the Fire Marshal of the County shall have authority to enforce provisions of this Chapter, such authority terminating upon the appointment of a Fire Marshal by the Council as provided herein.

Vienna, Va., Town Code § 7-19 (1988)

Enforcement of the Virginia Statewide and Town of Vienna Fire Prevention Codes.

The Town of Vienna shall enforce the Virginia Statewide Fire Prevention Code promulgated by the Board of Housing and Community Development of the Commonwealth of Virginia pursuant to Section 27-98 of the Code of Virginia. The provisions of the Virginia Statewide Fire Prevention Code and the Fire Prevention Code of the Town of Vienna, Virginia shall be enforced by the Town Fire Marshal, the Deputy Town Fire Marshal, and members of the Fire Marshal's staff. The Fire Marshal,

the Deputy Fire Marshal, and members of the Fire Marshal's staff shall have all of the powers of the local fire official and the local arson investigator and the local fire marshal and his assistants set forth in Title 27 of the Code of Virginia, and all of the powers of the fire official and the enforcing agency set forth in the Virginia Statewide Fire Prevention Code and the Fire Prevention Code of the Town of Vienna, Virginia.

Fairfax County, Va., Zoning Ordinance, Article 3
(Reprint 1988) (excerpts)

RESIDENTIAL DISTRICT REGULATIONS

PART I 3-100 R-1 RESIDENTIAL DISTRICT, ONE DWELLING UNIT/ACRE

3-101 Purpose and Intent

The R-1 District is established to provide for single family detached dwellings at a density not to exceed one (1) dwelling unit per one (1) acre; to allow other selected uses which are compatible with the low density residential character of the district; and otherwise to implement the stated purpose and intent of this Ordinance.

3-102 Permitted Uses

1. Accessory uses and home occupations as permitted by Article 10.
2. Agriculture, as defined in Article 20.
3. Dwellings, single family detached.
4. Public uses.

3-103 Special Permit Uses

For specific Group uses, regulations and standards, refer to Article 8.

1. Group 2—Interment Uses.
2. Group 3—Institutional Uses.
3. Group 4—Community Uses.
4. Group 5—Commercial Recreation Uses, limited to:

A. Commercial swimming pools, tennis courts and similar courts

5. Group 6—Outdoor Recreation Uses.
6. Group 7—Older Structures.
7. Group 8—Temporary Uses.
8. Group 9—Uses Requiring Special Regulation, limited to:

A. Barbershops or beauty parlors as a home occupation

B. Home professional offices

C. Sawmilling of timber

D. Veterinary hospitals

E. Accessory dwelling units

3-104 Special Exception Uses

For specific Category uses, regulations and standards, refer to Article 9.

1. Category 1—Light Public Utility Uses.
2. Category 2—Heavy Public Utility Uses, limited to:

A. Electrical generating plants and facilities

B. Landfills

C. Water purification facilities

3. Category 3—Quasi-Public Uses, limited to:

A. Colleges, universities

B. Cultural centers, museums and similar facilities

C. Housing for the elderly

D. Institutions providing housing and general care for the indigent, orphans and the like

E. Medical care facilities, except nursing facilities which have a capacity of less than fifty (50) beds

F. Private clubs and public benefit associations

G. Quasi-public parks, playgrounds, athletic fields and related facilities

H. Child care centers and nursery schools which have an enrollment of 100 or more students daily

I. Private schools of general education which have an enrollment of 100 or more students daily

J. Private schools of special education which have an enrollment of 100 or more students daily

K. Alternate uses of public facilities

L. Dormitories, fraternity/sorority houses, rooming/boarding houses, or other residence halls

4. Category 4—Transportation Facilities.

5. Category 5—Commercial and Industrial Uses of Special Impact, limited to:

A. Commercial off-street parking in Metro Station areas as a temporary use

B. Establishments for scientific research and development

C. Funeral chapels

D. Marinas, docks and boating facilities, commercial

E. Offices

F. Plant nurseries

3-105 Use Limitations

1. No sale of goods or products shall be permitted, except as accessory and incidental to a permitted, special permit or special exception use.
2. All uses shall comply with the performance standards set forth in Article 14.
3. Cluster subdivisions may be permitted in accordance with the provisions of Sect. 9-615.

3-106 Lot Size Requirements

1. Minimum district size for cluster subdivisions: 5 acres
2. Average lot area: No Requirement
3. Minimum lot area
   A. Conventional subdivision lot: 36,000 sq. ft.
   B. Cluster subdivision lot: 25,000 sq. ft.
4. Minimum lot width
   A. Conventional subdivision lot:
      (1) Interior lot—150 feet
      (2) Corner lot—175 feet
   B. Cluster subdivision lot:
      (1) Interior lot—No Requirement
      (2) Corner lot—125 feet
5. The minimum district size requirement presented in Par. 1 above may be waived by the Board in accordance with the provisions of Sect. 9-610.

3-107 Bulk Regulations

1. Maximum building height
   A. Single family dwellings: 35 feet
   B. All other structures: 60 feet

2. Minimum yard requirements

A. Single family dwellings

(1) Conventional subdivision lot

(a) Front yard: 40 feet

(b) Side yard: 20 feet

(c) Rear yard: 25 feet

(2) Cluster subdivision lot

(a) Front yard: 30 feet

(b) Side yard: 12 feet, but a total minimum of 40 feet

(c) Rear yard: 25 feet

B. All other structures

(1) Front yard: Controlled by a 50° angle of bulk plane, but not less than 40 feet

(2) Side yard: Controlled by a 45° angle of bulk plane, but not less than 20 feet

(3) Rear yard: Controlled by a 45° angle of bulk plane, but not less than 25 feet

3. Maximum floor area ratio: 0.15 for uses other than residential

3-108 Maximum Density

One (1) dwelling unit per acre

3-109 Open Space

In subdivisions approved for cluster development, 20% of the gross area shall be open space

3-110 Additional Regulations

1. Refer to Article 2, General Regulations, for provisions which may qualify or supplement the regulations presented above.
2. Refer to Article 11 for off-street parking, loading and private street requirements.
3. Refer to Article 12 for regulations on signs.
4. Refer to Article 13 for landscaping and screening requirements.
5. Refer to Article 17 for uses and developments which require the submission of a site plan.

Fairfax County, Va., Zoning Ordinance, Article 9
(Reprint 1988; Supp. No. 24, 1989) (excerpts)

SPECIAL EXCEPTIONS

PART 3 9-300 CATEGORY 3 QUASI-PUBLIC USES

9-301 Category 3 Special Exception Uses

1. Colleges, universities.
2. Conference centers and retreat houses, operated by a religious or non-profit organization.
3. Cultural centers, museums and similar facilities.
4. Housing for the elderly.
5. Institutions providing housing and general care for the indigent, orphans and the like.
6. Medical care facilities, except nursing facilities which have a capacity of less than fifty (50) beds.
7. Private clubs and public benefit associations.
8. Quasi-public parks, playgrounds, athletic fields and related facilities.
9. Sports arenas, stadiums as a principal use.
10. Child care centers and nursery schools which have an enrollment of 100 or more students daily.
11. Private schools of general education which have an enrollment of 100 or more students daily.
12. Private schools of special education which have an enrollment of 100 or more students daily.
13. Alternate uses of public facilities.
14. Dormitories, fraternity/sorority houses, rooming/boarding houses, or other residence halls provid-

ing off-campus residence for more than four (4) unrelated persons who are students, faculty members, or otherwise affiliated with an institution of higher learning.

9-302 Districts in Which Category 3 Uses May Be Located

1. Category 3 uses may be permitted by right in the following districts:

   PDH, PDC Districts: Limited to uses 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13 and 14 when represented on an approved development plan

   PRC District: All uses when represented on an approved development plan

   C-1, C-2, C-3, C-4 Districts: Limited to uses 10, 11 and 12

   C-5, C-6, C-7, C-8 Districts: Limited to uses 11 and 12

   I-I District: Limited to uses 10 and 11
   I-1, I-2, I-3, I-4, I-5 Districts: Limited to uses 10, 11 and 12
   I-6 District: Limited to uses 10 and 11

2. Category 3 uses may be allowed by special exception in the following districts:

   R-A, R-P Districts: Limited to uses 8, nursery schools, 11 and 13
   R-C District: Limited to uses 3, 5, 8, nursery schools, 11, 13 and 14
   R-E, R-1 Districts: Limited to uses 1, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13 and 14
   All other R Districts: Limited to uses 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13 and 14

   C-1, C-2, C-3, C-4 Districts: Limited to uses 1, 2, 3, 4, 5, 6, 7, 8, 13 and 14

C-5, C-6 Districts: Limited to uses 1, 2, 3, 6, 7, 8, 10, 13 and 14
C-7, C-8 Districts: Limited to uses 1, 2, 3, 6, 7, 8, 9, 10, 13 and 14
I-I District: Limited to uses 10 and 11
I-1 District: Limited to uses 1, 2, 3, 6, 7, 8, 10, 11, 13 and 14
I-2, I-3 Districts: Limited to uses 1, 2, 3, 6, 7, 8, 9, 10, 11, 13 and 14
I-4 District: Limited to uses 1, 2, 3, 6, 7, 8, 9, 10, 11 and 13
I-5, I-6 Districts: Limited to uses 7, 8, 9, 10, 11 and 13

9-303 Additional Submission Requirements

In addition to the submission requirements set forth in Sect. 011 above, all applications for Category 3 uses shall be accompanied by the following items:

1. For public uses, a certified copy of the law, ordinance, resolution or other official act adopted by the governmental entity proposing the use, authorizing the establishment of the proposed use at the proposed location, shall be provided.
2. For public uses, a statement by an official or officer of the governmental body shall be presented giving the exact reasons for selecting the particular site as the location for the proposed facility.
3. All applications for medical care facilities shall be filed at the same time as the application for a State Medical Facilities Certificate of Public Need. The application for the special exception shall be referred to the Health Care Advisory Board for a recommendation and report, which shall be developed in accordance with the provisions of Par. 1 and 2 of Sect. 308 below and furnished to the Planning Commission and Board of Supervisors.

9-304 Standards for All Category 3 Uses

In addition to the general standards set forth in Sect. 006 above, all Category 3 special exception uses shall satisfy the following standards:

1. For public uses, it shall be concluded that the proposed location of the special exception use is necessary for the rendering of efficient governmental services to residents of properties within the general area of the location.
2. Except as may be qualified in the following Sections, all uses shall comply with the lot size requirements of the zoning district in which located.
3. Except as may be qualified in the following Sections, all uses shall comply with the bulk regulations of the zoning district in which located; however, subject to the provisions of Sect. 9-607, the maximum building height for a Category 3 use may be increased.
4. All uses shall comply with the performance standards specified in the zoning district in which located.
5. Before establishment, all uses shall be subject to the approval of a site plan prepared in accordance with the provisions of Article 17.

9-309 Additional Standards for Child Care Centers and Nursery Schools as Set Forth in Par. 10 of Sect. 301 Above

1. In addition to complying with the minimum lot size requirements of the zoning district in which located, the minimum lot area shall be of such size that 100 square feet of usable outdoor recreation area shall be provided for each child that may use the space at any one time. Such area

shall be delineated on a plat submitted at the time the application is filed.

For the purpose of this provision, usable outdoor recreation area shall be limited to:

A. That area not covered by buildings or required off-street parking spaces.

B. That area outside the limits of the minimum required front yard, unless specifically approved by the Board in commercial and industrial districts only.

C. Only that area which is developable for active outdoor recreation purposes.

D. An area which occupies no more than eighty (80) percent of the combined total areas of the required rear and side yards.

2. For each person enrolled, indoor recreation space shall be provided in accordance with the provisions of Chapter 30 of The Code.

3. All such uses shall be located so as to have direct access to an existing or programmed public street of sufficient right-of-way and cross-section width to accommodate pedestrian and vehicular traffic to and from the use as determined by the Director. To assist in making this determination, each applicant, at the time of application, shall provide an estimate of the maximum expected trip generation, the distribution of these trips by mode and time of day, and the expected service area of the facility. As a general guideline, the size of the use in relation to the appropriate street type should be as follows, subject to whatever modification and conditions the Board deems to be necessary or advisable:

Number of Persons	Street Type
4-75	Local
76-660	Collector
660 or more	Arterial

4. All such uses shall be located so as to permit the pick-up and delivery of all persons on the site.

5. No such use shall be permitted unless it is determined by the County Department of Health Services that the location does not pose any hazard to the health, safety and welfare of the children.

9-310 Additional Standards for Private Schools of General Education and Private Schools of Special Education as Set Forth in Par. 11 and Par. 12 of Sect. 301 Above

1. In addition to complying with the minimum lot size requirements of the zoning district in which located, the minimum lot area for a private school of general education shall be of such size that:

   A. 200 square feet of usable outdoor recreation area shall be provided for each child in grades K-3 that may use the space at any one time, and

   B. 430 square feet of usable outdoor recreation area shall be provided for each child in grades 4-12 that may use the space at any one time.

   Such usable outdoor recreation area shall be delineated on a plat submitted at the time the application is filed.

   For the purpose of this provision, usable outdoor recreation area shall be limited to:

A. That area not covered by buildings or required off-street parking spaces.

B. That area outside the limits of the required front yard.

C. Only that area which is developable for active outdoor recreation purposes.

D. An area which occupies no more than eighty (80) percent of the combined total areas of the required rear and side yards.

2. In addition to complying with the minimum lot size requirements of the zoning district in which located, the minimum lot area of a private school of special education shall be based upon a determination made by the Board; provided, however, that the proposed use conforms with the provisions set forth in Sect. 304 above.

3. For each person enrolled, indoor recreation space shall be provided in accordance with the provisions of Chapter 30 of The Code.

4. The provisions set forth in Par. 3, 4 and 5 of Sect. 309 above shall also apply to private schools of general education and private schools of special education.

May 19, 1989, Letter from Theodore Austell, III, Clerk to the Board of Supervisors, to Robert L. Thoburn

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[SEAL]

COMMONWEALTH OF VIRGINIA
COUNTY OF FAIRFAX
4100 Chain Bridge Road
Fairfax, Virginia 22030

May 19, 1989

Mr. Robert L. Thoburn
1636 Crowell Road
Vienna, Virginia 22180

Re: Special Exception
Number SE 88-C/D-098

Dear Mr. Thoburn:

At a regular meeting of the Board of Supervisors held on May 8, 1989, the Board approved Special Exception Number SE 88-C/D-098, in the name of Robert L. Thoburn T/A Fairfax Christian School, located at Tax Map 18-3 ((3)) 2, 3, 4A; 18-3 ((1)) 4, and 5 for a private school of general education and a caretaker's residence as an accessory use pursuant to Section 3-E04 of the Fairfax County Zoning Ordinance, by requiring conformance with the following development conditions:

1. This Special Exception is granted for and runs with the land indicated in this application and is not transferable to other land.

2. This Special Exception is granted only for the purpose(s), structure(s) and/or use(s) indicated on the Special Exception Plat approved with the application, as qualified by these development conditions.

3. This Special Exception is subject to the provisions of Article 17, Site Plans. A site plan shall

be submitted for approval. Any plan submitted pursuant to this Special Exception shall be in substantial conformance with the approved Special Exception Plat and these conditions.

4. The maximum daily enrollment of students in grades K-12 shall be limited to 310, with not more than forty (40) of those students being under the age of five (5) years.

5. The normal hours of operation of the private school shall be limited to 7:00 a.m. to 6:00 p.m. Monday through Friday. Occasional special events related to the school and community serving events may be conducted outside the normal hours of operation.

6. The structures at 1620, 1624 and 1628 Hunter Mill Road (Parcels 2, 3, and 4) shall be used for classroom and administrative purposes only; the structure at 1630 Hunter Mill Road (Parcel 5) shall be limited to the caretakers residence; the structure at 10700 Sunset Hills Road (Parcel 4A) shall be limited to school administration purposes. The occupancy load for each structure shall meet Health Department requirements for septic service.

7. The applicant shall obtain all required permits and inspections prior to occupying the structures at 1620, 1624, and 1628 Hunter Mill Road for classroom and administrative purposes and the structure at 10700 Sunset Hills Road for school administration purposes. The applicant shall remove walls, or portions of walls, as may be deemed necessary by the Director of the Department of Environmental Management, in order that work previously performed without proper permits may be inspected for conformance with applicable codes.

8. Development shall be strictly limited to that shown on the Special Exception Plat dated December 1988 except that connections may be provided between existing travelways and parking area pursuant to Proposed Development Condition #13.

9. Erosion and sediment control shall be provided and maintained in accordance with provisions of Chapter 14 of the Fairfax County Code and the *Public Facilities Manual* as determined by the Director of the Department of Environmental Management. All denuded areas including the soccer field, multi-use court, play areas and septic fields, shall be stabilized and permanently maintained in ground cover as required by the Code.

10. Stormwater management shall be provided on-site to the satisfaction of the Department of Environmental Management.

11. Limits of clearing and grading shall not extend beyond what is cleared and graded, including; buildings, shaded areas, soccer field, multi-purpose court, tot lot, septic fields, and play field, as indicated on the Special Exception Plat dated December 1988.

12. A single consolidated entrance for 1624 and 1628 Hunter Mill Road shall be provided in a location and to a standard acceptable to the Virginia Department of Transportation (VDOT). The entrance at 1620 Hunter Mill Road shall remain open only to serve the nine (9) parking spaces, as indicated on the Special Exception Plat dated December 1988. Emergency access acceptable to the Fire Marshal shall be provided to 1620, 1624 and 1628 Hunter Mill Road.

13. A left-turn deceleration lane northbound on Hunter Mill Road, into the consolidated entrance referenced in the preceding condition, shall be provided to VDOT standards.

14. The septic field on the northern portion of the site shall be installed with a twenty-five (25) foot setback from the northern property boundary. Existing vegetation shall be retained within this setback.

15. In accordance with Chapter 30, Section 1-4, Par. B, "There shall be twenty (20) square feet of classroom space per child, exclusive of bathrooms, lockers, kitchens, storage and isolation rooms."

16. Thirty-five (35) permanent parking spaces, as designated on the Special Exception Plat dated December 1988, shall be provided on-site and shall be designed and striped according to the Fairfax County Public Facilities Manual. Ten (10) of these parking spaces shall be designated for the drop off/pick up of children. A sign to that effect shall be erected in a location to be approved by the Department of Environmental Management.

17. The structures at 1620, 1624 and 1628 Hunter Mill Road shall be connected to public water, as approved by the Department of Environmental Management, and the existing wells abandoned and capped in accordance with the applicable County codes.

18. The structures at 1620, 1624, and 1628 Hunter Mill Road shall be served by a Type 1 or Type 2 sewage disposal system, as approved by the Department of Environmental Management and the Health Department.

19. School lunches shall not be prepared on site. Food preparation on-site shall be limited to snacks.

20. At least sixty (60) per cent of the student enrollment shall be bused to the private school.

21. Appropriate Fairfax County personnel shall be permitted on-site during operational hours for the purpose of inspecting for compliance with these Special Exception conditions.

This approval, contingent on the above noted conditions, shall not relieve the applicant from compliance with the provisions of any applicable ordinances, regulations, or adopted standards. The applicant shall be himself responsible for obtaining the required Non-Residential Use Permit through established procedures, and this Special Exception shall not be valid until this has been accomplished.

Under Section 9-015 of the Zoning Ordinance, this Special Exception shall automatically expire, without notice, eighteen (18) months after the approval date of the Special Exception unless the activity authorized has been established, or unless construction has commenced, and is diligently pursued, or unless additional time is approved by the Board of Supervisors because of the occurrence of conditions unforeseen at the time of the approval of this Special Exception. A request for additional time shall be justified in writing, and must be filed with the Zoning Administrator prior to the expiration date.

The Board also directed that staff expedite the site plan processing.

In addition, the Board 1) modified the transitional screening requirement; and 2) waived the barrier requirement to that shown on the Special Exception Plat.

If you have any questions concerning this Special Exception, please give me a call.

Sincerely,

/s/ Theodore Austell, III
THEODORE AUSTELL, III
Clerk to the Board of
Supervisors (Acting)

TAIII/ns

cc: Joseph T. Hix
Real Estate Division, Assessments
Gilbert R. Knowlton, Deputy
Zoning Administrator
Donald D. Smith
Permit, Plan Review Branch
Seldon H. Garnet, Chief
Inspection Services Division
Building Plan Review Branch
Barbara A. Byron, Director
Zoning Evaluation Division
Robert Moore, Transportation Planning Division,
Office of Transportation
Kathy Ichter, Transportation Road Bond Division,
Office of Transportation
Department of Environmental Management
A. V. Bailey, Resident Engineer
Virginia Department of Transportation
Richard Jones, Manager, Land Acquisition &
Planning Division
Fairfax County Park Authority